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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTIONS PRESENTED

1. Whether Section 8(a) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. (Supp. II)

* The named defendants-appellees in the court of appeals were Cecil D. Andrus, who was Secretary of the Interior, James R. Schlesinger, who was Secretary of Energy, and the United States of America. Because Secretary Watt and Secretary James B. Edwards are the successors to Secretaries Andrus and Schlesinger, we have substituted them as federal parties to this suit, pursuant to Rule 40.3 of the Rules of this Court.

The named plaintiffs-appellants in the court of appeals were Energy Action Educational Foundation, Consumer Federation of America, Consumer Energy Council of America, Michigan Citizens Lobby, Arkansas Consumer Research, Inc., Service Employees International Union, International Association of Machinists, Citizen/Labor Energy Coalition, Texas Consumer Association, M. James Doling, Paul Casagrande, Kathleen F. O'Reilly, California State Lands Commission, and City of Long Beach.

1337, enumerating specific bidding systems for lease sales of oil and gas on the Outer Continental Shelf, requires the Secretary of Energy to promulgate regulations for each of those systems, and the Secretary of the Interior to use each of them in actual lease sales.

2. Whether the plaintiffs in this case have standing to sue.

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The Solicitor General, on behalf of the Secretary of the Interior, the Secretary of Energy, and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-54a) is not reported. The opinion of the district court (App. C, *infra*, 57a-73a) is not reported. The court of appeals also issued an earlier opinion in this case, on December 20, 1979 (App. D, *infra*, 75a-100a), which is reported at 631 F.2d 751.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1980 (App. B, *infra*, 55a-56a). On January 15, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, 38 U.S.C. (Supp. II) 1331 *et seq.*, are reprinted in App. E, *infra*, 101a-106a.

STATEMENT

This action was brought by three individuals, seven consumer groups, two labor organizations, and two California governmental entities, against the Secretaries of Energy and the Interior, and the United States. The complaint sought, *inter alia*, to require the defendants to promulgate regulations for

the various bidding systems enumerated in Section 8(a) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. (Supp. II) 1337(a), and to prohibit the conduct of lease sales on the Outer Continental Shelf without such regulations. On October 30, 1980, the United States Court of Appeals for the District of Columbia Circuit entered an opinion agreeing with the plaintiffs' interpretation of the statute (App. A, *infra*, 1a-54a) and an order requiring the Secretary of Energy to issue the contested regulations (App. B, *infra*, 55a-56a).

1. The first federal statute enacted to permit the development of oil and gas resources on the Outer Continental Shelf ("OCS") was the Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462, 43 U.S.C. 1331 *et seq.* It directed the Secretary of the Interior to establish and administer a leasing program to develop the oil and gas resources of the Outer Continental Shelf.[1] Section 8(a) of the Act, 43 U.S.C. 1337(a), provided for bidding by sealed bids. Two systems of bidding for leases were available "at the discretion of the Secretary." Bidding could be "[1] on the basis of a cash bonus with a royalty fixed by the Secretary at not less than 12½ per centum in amount or value of the production saved, removed or sold, or [2] on the basis of royalty, but at not less than the per centum above mentioned, with a cash bonus fixed by the Secretary." *Ibid.*

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[1] As the court below explained (App. D, *infra*, 76a-77a n.2), the term "Outer Continental Shelf" embraces all submerged lands of the Shelf lying seaward of the areas conceded to the coastal States by the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.* (usually a three-mile belt from shore), "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. 1331(a).

Prior to 1978, virtually all of the lease sales were issued under the cash bonus bid-fixed royalty method.[2] Under that system a lease was awarded to the qualified bidder who made the highest cash bid deemed acceptable to the Secretary on a particular tract. The lessee was then required to pay a royalty, established in advance of the sale, as a fixed and constant percentage of the value of the production. The royalty was required to be at least 12½%; in practice it was almost always 16⅔% (see App. A, *infra*, 7a & n.13).

In 1978, Congress enacted comprehensive amendments to the Act (Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, 43 U.S.C. (Supp. II) 1331 *et seq.*). Section 102 of the Amendments (43 U.S.C. (Supp. II) 1802) sets out the purpose of Congress: the Amendments are designed to preserve, protect, and develop the oil and gas resources of the OCS in a manner which is consistent with the need to make such resources available as rapidly as possible, to balance resource development with protection of the environment, to insure the public a fair and equitable return on the resources of the OCS, and to preserve and maintain free enterprise competition (43 U.S.C. (Supp. II) 1802(2)).

To assist in achieving those purposes, Section 205 of the Amendments, 92 Stat. 640, extensively changed Section 8 of the 1953 Act. Section 8(a)(1) (43 U.S.C. (Supp. II) 1337(a)(1); App. E, *infra*, 101a-103a), authorizes the Secretary of the Interior to grant leases to qualified bidders by competitive bidding under regulations promulgated by the Sec-

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[2] A few leases in 1974 and 1977 were on the basis of royalty bidding with a fixed cash bonus (App. A, *infra*, 7a n.13).

retary of Energy.[3] The bidding shall be by sealed bid and "at the discretion of the Secretary," on the basis of bidding systems set out in paragraphs (A) through (H) of the subsection.

The bidding method described in Section 8(a)(1)(A) is the traditional cash bonus bid-fixed royalty method. Paragraphs (B) through (G) set out other approaches, including the variable royalty bid-fixed bonus method, the cash bonus bid-sliding scale royalty method, and various methods that contain net profits and work commitment components. Two of these paragraphs are of particular concern here: Paragraph (E), the "fixed cash bonus with the net profit share reserved as the bid variable"; and Paragraph (G), the "work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty." In contrast to the preceding paragraphs, paragraph (H) is a "catch-all" category that permits the use of other, non-specified bidding systems. Under Section 8(a)(4)(A) (43 U.S.C. (Supp. II) 1337(2)(4)(A); App. E, *infra*, 103a), the Secretary of Energy must submit any such unspecified system to the Congress; the system may then be used by the Secretary of the Interior unless either House passes a resolution of disapproval within 30 days.

Section 8(a)(5)(B) (43 U.S.C. (Supp. II) 1337(a)(5)(B); App. E, *infra*, 104a) is the only provision in the 1978 Amendments that expressly constrains the "discretion" granted in Section 8(a)(1) to the Secretary of the Interior. Section 8(a)(5)(B)

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[3] Under the Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565, 578, 42 U.S.C. (Supp. II) 7152(b) (App. E, *infra*, 101a), the bidding system regulations of Section 8(a)(1) of the OCS Lands Act, are to be issued by the Secretary of Energy, in consultation with the Department of the Interior.

provides that the Secretary is to apply the cash bonus bid-fixed royalty system to between 40 and 80% of all acreage offered annually and to experiment with the other systems on the remaining 20 to 60% of the acreage offered, unless the Secretary determines that those limitations are inconsistent with the purposes and policies of the Act. In addition, under Section 8(a)(9)(D) (43 U.S.C. (Supp. II) 1337(a)(9)(D); App. E, *infra*, 104a), the Secretary of Energy is required to consult with the Secretary of the Interior and submit a yearly report to Congress, setting out which bidding methods have not or will not be used, and explaining the reasons for the decision not to use them. See also 43 U.S.C. (Supp. II) 1343(2)(A) (App. E, *infra*, 105a-106a).

The Secretary of Energy has issued regulations under Section 8(a)(1) for the use of several of the defined bidding systems.[4] Final regulations governing bidding systems authorized by Section 8(a)(1)(A)-(C) (cash bonus bid-fixed royalty, royalty bid-fixed cash bonus, and cash bonus bid-fixing sliding scale royalty), were promulgated on February 5, 1980. 45 Fed. Reg. 9536. Final regulations for a cash bonus bid-fixed net profit share bidding system were promulgated on May 14, 1980. 45 Fed. Reg. 36784. The Department of Energy also requested comments on possible bidding systems utilizing a work commitment component in a notice published July 25, 1980 (45 Fed. Reg. 49586); it is cur-

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[4] While the regulations governing the alternative bidding systems were being promulgated, the Secretary of the Interior continued to issue leases under the systems authorized in the original 1953 Act as Congress intended. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 138 (1977).

rently developing a proposed regulation. A proposed regulation governing a bidding system with net profit share as the bidding component will be issued for public comment on or before February 28, 1981.[5]

The Secretary of the Interior has prepared, approved and sent to Congress a five-year oil and gas leasing program pursuant to Section 18 of the OCS Lands Act, as amended, 43 U.S.C. (Supp. II) 1344. The program provides for 36 sales with approximately seven sales each year. The first three sales were held in September, October and November of 1980. The next six sales are scheduled in consecutive months beginning in May, 1981.

2. This action was commenced with the filing of a complaint on June 22, 1979 (J.A. 1-84).[6] In that complaint respondents claimed that the Secretary of Energy had failed to issue regulations for all the bidding systems set out in Section 8(a)(1), and that the sale of OCS leases in the absence of those regulations violated the Act (J.A. 75-76). Respondents also claimed that the Secretary of the Interior's use of the cash bonus bid-fixed royalty bidding system, both before and after the 1978 Amendments, was an abuse of the Secretary's discretion in offering leases under the OCS Lands Act (J.A. 77-83).

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[5] On remand to the district court, the parties stipulated to the entry of an order requiring the Department of Energy to issue a final regulation for a variable net profit share bidding system by May 25, 1981, and a variable work commitment bidding system by June 30, 1981.

[6] "J.A." refers to the Joint Appendix prepared for the first appeal of this case. No Joint Appendix was prepared for the second appeal, due to the time constraints of the expedited appeal.

On June 25, 1979, four days before the scheduled opening of bids at Lease Sale 48, respondents filed a motion for a preliminary injunction seeking to prevent further lease sales "in the absence of regulations establishing the full range of bid systems mandated by the Outer Continental Shelf Lands Act" (J.A. 129, 131). After a hearing, the district court denied that motion, ruling that respondents had not shown a likelihood of prevailing on the merits (J.A. 293), and that the defendants had not acted arbitrarily and capriciously in failing to promulgate some of the regulations authorized in Section 8(a)(1) "in light of the complexity and sensitivity involved in preparation of such regulations" (J.A. 294). Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed. In its opinion, authored by the late Judge Leventhal, that court discussed the statutory scheme (App. D, *infra*, 86a-87a; emphasis in original; citation omitted):

> Congress enacted the provisions dealing with lease bidding after exhaustively reviewing the Secretary's 25-year record of administering the OCS Act. It cannot be doubted that Congress had the opportunity to discard the cash bonus-fixed royalty system or to restrain the Secretary's discretion in according it substantial use. In essence, it chose to do neither.
>
> Congress declined to omit cash bonus-fixed royalty bidding when it rewrote § 8(a) of the OCS Act. That section continues to provide that lease bidding, "at the *discretion* of the Secretary," may be on the basis of cash bonus-fixed royalty bidding or fixed bonus-variable royalty bidding. Other bidding options were added to the list, though authorizing regulations for those systems must be promulgated in advance of their use.

> But Congress did not stop there. The Secretary's discretion in choosing among alternative bidding systems was limited in one crucial respect. Elsewhere in that section, at §8(a)(5)(B), Congress mandated that cash bonus-fixed royalty bidding be utilized in a large percentage of leases. * * * Congress affirmatively intended that subsequent to passage of the amendments, cash bonus-fixed royalty bidding was to be used in at least 40% of all leases each year for five years. The only limitation put on use of this option was that it should not be used for more than 80% of the leases.

The court also stated that on remand, the district court might consider a number of factors regarding the Secretary of the Interior's choice of bidding methods, and whether the Secretary of Energy's delay in issuing profit sharing regulations or the Secretary of the Interior's failure to experiment more widely might constitute a violation of the Act (App. D, *infra*, 96a-97a).

After the case had been remanded to the district court, both parties moved for summary judgment on the issue of whether the 1978 Amendments require promulgation of regulations implementing all bidding systems set out in Section 8(a)(1).[7] Respondents also sought a preliminary injunction to prevent future lease sales until regulations were promulgated. On September 17, 1980, the district court denied all motions (App. C, *infra*, 60a-61a, 74a). Respondents appealed from the denial of their motion for

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[7] Petitioners also contended that the Secretary of the Interior's continued use of the cash bonus bid-fixed royalty bidding system was an appropriate exercise of his discretion (App. C, *infra*, 65a, 66a).

preliminary injunction.[8] On September 29, 1980, the court of appeals entered an order affirming the district court's denial of a preliminary injunction for the sales scheduled in September, October and November 1980 (App. A, *infra*, 2a-3a & n.5). The court reserved jurisdiction over the case to decide all remaining issues presented by the appeal.

3. The court of appeals issued a subsequent opinion and judgment on October 30, 1980 (App. A, *infra*, 1a-54a; App. B, *infra*, 55a-56a). That opinion took note of the fact that the appeal was taken from the denial of a preliminary injunction. Nonetheless, in the interest of judicial economy and to provide guidance for the litigation on remand, the court decided to rule on the "basic statutory issue dominating this protracted litigation"—the scope of the duties imposed by the alternative bidding provisions of the 1978 Amendments to the OCS Lands Act (App. A, *infra*, 23a).

The court relied primarily on legislative history to establish that a primary purpose of the 1978 Amendments was to foster experimentation among various bidding systems in order to find alternatives to the traditional cash bonus bid-fixed royalty method (App. A, *infra*, 25a-35a). In light of that history and the expressed statutory purposes in 43 U.S.C. (Supp. II) 1802(2), the court rejected the view that "the Secretary [of the Interior] is free to choose to experiment with some but not other bidding system options * * * [and] to ignore the options that do not involve front end cash bonuses as the bidding variable" (App.

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[8] On the motion of respondents, the appeal was expedited. Three days were allowed for simultaneous briefing, and argument was held on the following day.

A, *infra*, 29a). Accordingly, the court concluded "that the Secretary of Energy does have a statutory obligation to promulgate regulations on the major alternatives to front end cash bonus bidding, including the variable net profit share bidding option" (*id.* at 34a).[9]

The court also found that progress in promulgating regulations for the new methods had proceeded too slowly to permit the required experimentation (App. A, *infra*, 46a-50a). The court concluded that "the balance of public equities" supported the district court's refusal to enjoin the 1980 lease sales, but that "it should be feasible" for regulations governing sales under paragraphs (E) and (G) (variable net profit and work commitment) to be in place before the 1981 sales, in order to give a fair test of those bidding methods through actual use (App. A, *infra*, 48a). Accordingly, the court ordered that those regulations should "to the maximum extent feasible", be promulgated by mid-1981, and before any further lease sales (App. A, *infra*, 50a).

In a final footnote, the court of appeals found standing in the respondents as consumers and as

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[9] The court ordered the Secretary of Energy to promulgate regulations governing the variable net profit and work commitment alternatives identified in paragraphs (E) and (G). App. A, *infra*, 50a. Parts of the opinion, however, suggest that the Secretary has an obligation to promulgate regulations covering *each* of the alternative bidding systems (App. A, *infra*, 35a, 38a, 46a). The scope of the Secretary of the Interior's obligation to experiment with the alternative systems is at least equally unclear. Compare App. A, *infra*, 38a, 40a-41a, 49a (obligation to test all) with 29a, 31a, 38a, 48a n.96, 49a (semble) (obligation to test non-cash bonus alternatives) and 38a, 41a-46a, 47a (obligation to test variable net profit share). See also App. A, *infra*, 47a n.95.

competitors.[10] The court found that the California governmental respondents had alleged a "concrete and tangible" economic injury (App. A, *infra*, 52a n.*)[11] and that the consumer respondents had alleged sufficient economic harm to have standing on that basis (*id.* at 52a-53a n.*).[12]

REASONS FOR GRANTING THE PETITION

In total disregard of the plain language of the statute, the court below has imposed substantial, but ill-defined, burdens on the Secretaries of Energy and the Interior. Those burdens and the uncertainty concerning their scope will seriously impede efforts to achieve the statutory goal of rapid, efficient, and orderly development of the nation's OCS oil and gas resources.

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[10] Respondents also asserted standing as taxpayers and citizens, on the theory that the government's failure to implement all the bidding methods in Section 8(a)(1) injured them in that the national treasury did not receive enough money for the resources (J.A. 70-71).

[11] The California State Lands Commission and the City of Long Beach alleged that their ability to lease their undeveloped oil and gas lands was threatened by the federal leasing project's "generous" terms (J.A. 71-72). They also claimed, in a letter filed in the district court (J.A. 102-103), that they were harmed in "drainage" situations: where a pool of oil or gas crosses the line separating state ownership from federal ownership. In such a situation, they claimed that they would receive insufficient payment for their share of pooled resources because of the low payments received by the federal government under its leases. No specific drainage situation, however, was identified.

[12] As consumers, respondents claimed that they were harmed because only large businesses could afford bidding systems using large cash bonuses and as a result there was less competition under those systems; the decreased competition, they reasoned, caused them to pay more for gas and oil they consumed than they would otherwise have to pay (J.A. 70, 79-80).

1. The decision of the court below requires the Secretary of Energy to promulgate regulations for, and the Secretary of the Interior to utilize, certain bidding systems, even if those systems have been determined to be inconsistent with the purposes of the Act. Thus, the Secretaries may not rely on computer-modeling, statistical projections, or similar studies to determine which of the specified experimental alternatives merit testing by actual leasing. This limitation on the exercise of their discretion not only requires the expenditure of needless administrative effort; it also may impede the efficient development of the OCS oil and gas reserves, because the lease terms have a significant effect on the exploration, development and production of OCS oil and gas.[13] Moreover, because leases under the OCS Lands Act are for substantial periods,[14] the adverse effects—both on the amount of oil and gas recovered and on federal revenues received—of the required testing of inferior bidding systems will be enduring.

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[13] For example, a lease reserving an unduly high profit share to the lessor is likely to discourage exploration, by reducing the incentive of the producer, and encourage excessive expenditures for pre-production costs, in order to reduce the size of the "profit". Moreover, an excessively high federal profit share may well lead to premature abandonment of marginally productive wells, or discourage development of marginally productive reservoirs altogether. A lease with an excessively high "work commitment"—*i.e.*, a commitment to develop the site—encourages uneconomical drilling, and the diversion of drilling resources from better prospects at other sites.

[14] Leases are issued for an initial period of 5 years—or up to 10 years if necessary to encourage exploration and development in adverse conditions—and as long thereafter as oil or gas is produced in paying quantities or approved drilling or well reworking operations are conducted (43 U.S.C. (Supp. II) 1337 (b)). Lease terms therefore may well extend for 30 years or more.

2. In light of the close relation between the bidding systems and the efficient development of the OCS oil and gas resources, Congress was careful to preserve to the responsible officials the discretion to select the particular bidding systems most likely to effectuate the Act's purposes. The text of the relevant portion of the OCS Lands Act is clear: Section 8(a)(1) provides that "at the discretion of the Secretary [of the Interior]" the bidding may be based on any of the methods set out in paragraphs (A) through (H) of that subsection. Furthermore, the Act contains one precise constraint on that discretion. Under Section 8(a)(5)(B), the Secretary is required to use methods other than the one described in paragraph (A) (the cash bonus bid-fixed royalty method) for between 20 and 60% of the total area offered for leasing in the five-year period beginning September 18, 1978.[15] In meeting that obligation, he is free to use any of the methods set out in paragraphs (B) through (H).[16] Indeed, Congress was careful to provide that even this narrow limitation on the Secretary's discretion would not apply if the Secretary determines the limitations are inconsistent with the purposes and policies of the OCS Lands Act (43 U.S.C. (Supp. II) 1337(a)(5)(B)). Moreover,

[15] In the 11 lease sales held since that date, 49% of the tracts offered have used systems other than the cash bonus bid-fixed royalty system. The experimental systems have included a fixed profit share bidding system and a bonus bidding system with an increased fixed royalty. Both of these systems have the effect of reducing the size of the front end bonus.

[16] If he wishes to rely on paragraph (H), a "catch-all" paragraph for methods not otherwise authorized, he must submit the proposed system to Congress, which may exercise a congressional veto (42 U.S.C. (Supp. II) 1337(a)(4)(A)).

43 U.S.C. (Supp. II) 1337(a)(9)(D), requiring a report to Congress explaining why "a particular bidding system has not been or will not be utilized" is inconsistent with a statutory requirement that all, or any, particular system must be utilized. In sum, the statute simply cannot reasonably be read as requiring either the Secretary of Energy to promulgate regulations for all the bidding systems identified in Section 8(a)(1), or the Secretary of the Interior to utilize them. Nor can it be read as requiring the issuance of regulations for and the use of any particular alternative.[17]

The court below avoided addressing the clear statutory language by focusing on the legislative history indicating that the Secretary of the Interior is to experiment with the various bidding methods in order to determine which methods might be used to best satisfy the purposes of the Act. Much of the legislative history loosely describes the methods available for experimention, but it does not unequivocally state that the Secretary has a duty to make use of *each* enumerated method, or of any particular one. To the extent that the legislative history does address the issue of what sort of experimentation must take place, it is consistent with the plain language of the Act. It shows that Congress intended to require the Secretary to experiment with alternatives to the traditional 16⅔% royalty-cash bonus bid leasing methods, in order to reduce the large front end payments and assure greater federal par-

[17] Section 8(a)(1) makes no distinction between the alternative systems. There is accordingly no statutory basis for the court below's identification of "major" or "significant" alternatives (App. A, *infra*, 34a, 48a n.96, 49a). Moreover, the addition of a "catch-all" category on the same basis as the other alternatives is strong evidence that none was intended to be mandatory.

ticipation in the continuing revenues from oil and gas discoveries. (See, *e.g.*, H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 54, 140 (1977); S. Rep. No. 95-284, 95th Cong., 1st Sess. 110, 146, 155 (1977); H.R. Rep. No. 95-1474, 95th Cong., 2d Sess. 47 (1978)).[18] Thus, Congress identified several alternatives, including the new cash bonus bidding systems described in paragraphs (C), (D), and (F), that would reduce the size of the front end bonuses. H.R. Rep. No. 95-590, *supra*, at 139. The duty to experiment is spelled out in 42 U.S.C. (Supp. II) 1337 (a)(5)(B), requiring the use of alternative systems in between 20% and 60% of lease sales during the experimental period. Neither that Section, nor the legislative history which led to its enactment, imposes any more stringent requirement.

3. Although the court below imposed obligations on the Secretaries that go beyond those contained in the OCS Lands Act, the extent of those additional obligations is unclear. Respondents agreed on remand to the entry of an order requiring only that the Secretary of Energy promulgate regulations concerning the variable net profit share and work commitment systerms; they also agreed to a stipulation that the Secretary of the Interior undertake good faith experimentation with the variable net profit share system (see 43 U.S.C. 1337(a)(1)(E) and (G)).[19] The

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[18] This general dissatisfaction with sole reliance on the traditional leasing system, coupled with the belief that a variety of alternatives should be considered, explains the legislative history's frequent imprecision in describing the alternatives to be tried. For example, there are many references to net profit share bidding systems, without distinguishing between fixed and variable net profit share systems (App. A, *infra*, 17a). This imprecision does not suggest a congressional intent to require a specific system.

[19] The stipulation concerning the Secretary of Interior was contingent on the government's decision not to file a petition

court of appeals' opinion in terms requires no more (App. A, *infra*, 47a n.95, 50a). But its analysis of the legislative history, as well as certain language in the opinion (see note 9, *supra*), could also support broader obligations—to issue regulations concerning *all* the specified alternatives, and to use either both specified non-cash bonus bidding systems, or even all the specified alternatives. Moreover, even if the Secretary need only utilize the variable net profit share bidding system, it is far from clear how many leases must be offered under this system in order to satisfy the court-imposed requirement of "meaningful experimentation" (App. A, *infra*, 47a, cf. 38a).[20]

These uncertainties concerning the responsibilities of the Secretaries under the Act can be expected to lead to considerable further litigation, with concomitant delays and disruptions in the orderly development of our OCS oil and gas reserves. Such a result is inconsistent with "[t]he basic purpose of [the OCS Amendments, which] is to promote the swift, orderly, and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf." S. Rep. No. 95-590, *supra*, at 53; cf. App. D, *infra*, 96a.

4. The potential for further disruptive litigation is substantially increased by the court's expansive

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for certiorari, and, accordingly, never became effective. It does, however, reflect the parties' interpretation of the court of appeals' mandate.

[20] In addition, although the court of appeals and the parties have assumed that each paragraph of 43 U.S.C. (Supp. II) 1337(a)(1) describes a precise and discrete bidding system, in fact some of those paragraphs, including paragraph (G), contain more than one bidding system variation. Thus, it is not clear what would constitute a sufficient exercise by the Secretaries of the responsibilities assigned to them by the court of appeals with regard to each type of system.

finding concerning standing. Under that ruling, respondents have standing "in their capacity as representatives of consumers of the oil produced on the OCS" (App. A, *infra*, 52a n.*). If any representative of a consumer of oil and gas may challenge the Secretaries' bidding system evaluations, the courts are open to suits by a host of groups anxious to prevent leasing under *any* scheme.

This Court's decisions do not support such an expansive reading of the standing doctrine. Instead, this Court has held that in order to have standing, the plaintiffs must allege a "distinct and palpable injury." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). They must also show that there is a "fairly traceable" causal connection between the claimed injury and the challenged conduct, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), so that if the relief sought is granted, the injury will be redressed. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-45 (1976).

No such showing has been made here. As consumers, respondents claim that if alternative bidding methods were used, competition for the leases would be increased, resulting in lower oil and gas prices to consumers.[21] But the price of gas and oil is controlled by so many factors of worldwide scale, and the possible influence of bidding methods used by the federal government on the price of oil is so small,[22] that it is impossible to predict any detectable change in the

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[21] This argument is not easily compatible with respondent's alternative standing argument that the federal lease terms currently being offered are so favorable to producers that the competing state lessors are injured.

[22] Federal OCS leases currently provide 12% of domestic oil production and 27% of domestic gas production. Between 40 and 50% of the oil we consume is imported.

price of oil and gas to consumers even assuming that the alternative systems are preferable.[23]

Analogous claims under the antitrust laws alleging similarly tenuous anticompetitive effects have been denied for lack of standing. See, *e.g.*, *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 500 (9th Cir. 1977); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 197 (2d Cir. 1970); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975). Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979) (consumers of hearing aids complained of a price-fixing conspiracy involving hearing aid manufacturers).[24] There is no reason to believe that the OCS Lands Act was intended to grant a cause of action for anticompetitive harm to a broader class of plaintiffs than were the statutes directly aimed at anticompetitive practices.[25]

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[23] If payments to the government for leases are regarded as costs to be recovered in prices charged for crude oil and natural gas from those leaseholds, any increase in such payments would tend to increase, rather than decrease, consumer prices.

[24] The other cases cited by the court of appeals to support "consumer" standing (App. A, *infra*, 52a-53a n.*) were brought by consumer groups to complain of Department of Energy or Federal Power Commission price increases for oil and gas producers, plainly situations where a clear, immediate and direct relationship existed between the challenged action and the impact on consumers.

[25] *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), also cited by the court of appeals (App. A, *infra*, 52a n.*), involved environmental issues rather than economic ones. This Court found, on the basis of detailed findings by the lower court, a causal relationship between the challenged construction of a nuclear power plant and the violations of the laws respondents alleged.

Similarly, there is no sufficient showing of any causal connection between the claimed harm to the California governmental entities and the challenged federal bidding practices. The complaint wholly fails to allege any specific state leasing activities carried on or to be carried on in the future, which will be harmed at all by the government's OCS leasing program. Nor does the possibility that "drainage" situations might arise confer standing on respondents (note 11, *supra*). Respondents have pointed to no specific "drainage" problem involving them that may be affected by OCS Lands Act leases. Even if there are such problems, the state interests in a "fair and equitable" share of the proceeds are amply protected by 43 U.S.C. (Supp. II) 1337(g)(2).[26]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1981

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[26] That Section requires the Secretary to offer the Governor of any affected State an agreement contemplating the "fair and equitable" division of the revenues generated. If the parties cannot agree on the terms of the agreement, the dispute is to be referred to a federal district court.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2127

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 79-1633)

Argued September 26, 1980

Decided October 30, 1980

Before: ROBINSON and WALD, *Circuit Judges;* and HAROLD GREENE,* *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Circuit Judge* WALD

WALD, *Circuit Judge*:

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

I. INTRODUCTION

For a second time in this case we are asked to determine whether the bidding systems employed by the Secretary of the Interior in leasing government offshore properties for oil and natural gas development comply with the Outer Continental Shelf Lands Act as substantially amended in 1978 ("OCSLA" or "the Act").[1] In an earlier decision this court found that the bidding systems utilized by the Secretary at that time did not contravene "the letter of the law."[2] We noted, however, that the time might come when the Secretary's continued failure to use the panoply of experimental bidding systems authorized by the Act would amount to an abuse of discretion.[3] Now we decide that, given the absence of significant progress toward experimenting with critical alternatives to front end cash bonus bidding systems since our prior decision, the day has arrived when the Secretary's continued delay is unreasonable and frustrates the essential purposes of OCSLA.

The present appeal challenges the district court's denial of appellants' motion for partial summary judgment, and in the alternative, motion for a preliminary injunction. Having heard argument on the appeal on an expedited basis, as required by statute,[4] this court affirmed the district court's refusal to enjoin the three lease sales scheduled for the fall of

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[1] 43 U.S.C.A. 1331 *et seq.*

[2] Energy Action Educational Foundation v. Andrus, Nos. 79-1768 and 79-1787 (D.C. Cir., Dec. 20, 1979).

[3] *Id.* slip op. at 21; conc. op. at 2.

[4] 43 U.S.C.A. § 1349(d).

1980 in an order dated September 29, 1980.[5] This opinion addresses the remaining aspects of the appeal not disposed of by the September 29, 1980 order.

II. BACKGROUND

We revisit a controversy initially ruled upon by this court almost a year ago. The parties now before the court are the same as they were then: Plaintiff-Appellants are seven consumer and two labor organizations, three private citizen-taxpayers, and two California governmental entities.[6] The Defendant-

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[5] Lease sales were scheduled for September 30, October 21, and an unspecified date in November, 1980. While we upheld the district court's refusal to enjoin these three imminent sales, we conclude for reasons discussed more fully below, that injunctive relief may not be inappropriate with respect to later sales. With the continued passage of time since the enactment of the 1978 OCSLA Amendments the appraisal will vary of appellants' likelihood of success on the merits, their irreparable injury, the balance of equities and the public interest. Washington metropolitan Area Transit Co. v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). These tests for injunctive relief increasingly tip in appellants' favor, as the number of sales that have been held without experimentation with OCSLA non-cash bonus bidding alternatives grows. In addition, since the currently scheduled future sales are several months hence, pre-sale preparations will be less finalized at this time so that requiring implementation of the alternative bidding systems before future sales take place should be more feasible and less disruptive than in the case of the three sales scheduled for the fall of 1980.

[6] The fourteen appellants are: Energy Action Educational Foundation; Consumer Federation of America; Consumer Energy Council of America; Michigan Citizens Lobby; Arkansas Consumer Research, Inc.; Service Employees International Union; International Association of Machinists;

Appelles are the Secretaries of the Interior and Energy, and the United States. Appellants' complaint, filed over a year ago, claimed that the Secretary of Energy failed to issue regulations for all the bidding systems set out in OCSLA, and that the sale of Outer Continental Shelf ("OCS") leases in the absence of those regulations violated OCSLA.[7] Appellants also

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Citizen/Labor Energy Coalition; Texas Consumer Association; M. James Doling; Paul Casagrande; Kathleen F. O'Reilly; California State Lands Commission; and the City of Long Beach, California.

[7] Complaint, ¶¶ 133-143, J.A. 1, 73-76. (Joint Appendix citations, "J.A." refer to the Joint Appendix prepared for the first appeal of this case in Nos. 79-1768 and 79-1787.)

Section 8(a)(1) of OCSLA, 43 U.S.C.A. § 1337(a)(1), sets out the permissible alternative bidding systems and reads as follows:

> (a)(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—
>
> (A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;
>
> (B) variable royalty bid based on a per centum in amount or value of the production

saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold; or

(H) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

claimed that the Secretary of Interior's use of the cash bonus-fixed royalty bidding system, both before and after the 1978 Amendments to OCSLA, amounts to an abuse of discretion.[8]

The case first came before this court upon appellants challenge to the district court's two orders denying appellants' motions for preliminary injunctive relief to stop further lease sales. In an opinion authored by the late Judge Leventhal this court affirmed the district court's rulings.

Judge Leventhal's analysis began with a review of the history of the federal statutes enacted to provide for the development of offshore land on the "Outer Continental Shelf."[9] A reprise of this legislative background is appropriate before analyzing our prior opinion.

The 1978 OCSLA Amendments

OCSLA, originally enacted in 1953, was the first federal statute to regulate the development of OCS oil and gas resources.[10] Since that time the federal government has been actively engaged in leasing OCS lands.[11] Before its amendment in 1978 the Act speci-

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[8] Complaint, ¶¶ 144-158, J.A. 1, 77-83 (Contending *inter alia* that cash bonus bidding did not yield fair market value. *See* p. 12 *infra*.)

[9] The term "Outer Continental Shelf" has been defined by Congress to include all submerged lands lying seaward and three miles outside State waters, "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a).

[10] 67 Stat. 462, 43 U.S.C. § 1331 *et seq.*

[11] As of the date the present appeal was argued, 52 sales of oil and gas leases have taken place on the OCS, resulting in the issuance of 3701 leases. Those leases currently yield nine

fied two alternative formats for lease bidding. The Secretary was directed to conduct competitive bidding by sealed bids either (1) on the basis of a cash bonus bid with a fixed royalty (fixed at no less than 12½ percent of the gross revenue of the lease), or (2) by a royalty rate bid with a fixed cash bonus payment.[12] Prior to 1978 virtually all of the OCS lease sales were transacted by the cash bonus-fixed royalty method with the royalty set in advance of bidding at 16-⅔ percent (one-sixth) of the gross value of production.[13] Under that system, a lease would be

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percent of domestic oil production and 24 percent of domestic gas production. After our order of September 29, 1980 a sale occurred on September 30, 1980; two more sales are scheduled for the remainder of 1980.

[12] 43 U.S.C. § 1337(a) (1976).

[13] There were, however, sales conducted by other methods. Some tracts were offered for lease sales on the basis of royalty bidding with a fixed cash bonus at OCS lease sales 36 (Santa Barbara Channel) and CI (Cook Inlet, Alaska) held on October 16, 1974 and October 27, 1977, respectively. At those two sales a total of 56 tracts were offered with royalty bidding and 38 received bids.

At nine sales in 1978 and 1979 some tracts were offered on the basis of bonus bidding with fixed sliding scale royalty. Under that system the Secretary initially sets a royalty schedule under which the lessee is required to pay a percentage which increases to as much as 60 percent as the value of production increases. The leases are awarded to the bidders which submit the highest acceptable cash bid for a particular tract. Brief for Appellants at 4, Energy Action Educational Foundation v. Andrus, No. 80-2127 (D.C. Cir., argued Sept. 26, 1980) [hereinafter "Brief for Appellants"].

In lease sale No. 35 off the coast of Southern California in December 1975, tracts were offered under a cash bonus system with fixed royalty doubled from the traditional 16⅔ percent to 33⅓ percent. H.R. Rep. No. 1835, 95th Cong., 2d Sess. 14-15 (Jan. 2, 1979). For a description of post-1978 bidding *see* pp. 11-12 *infra*.

awarded to the qualified bidder with the highest cash bid deemed acceptable to the Secretary on a particular tract.

With the exception of one minor amendment,[14] the original version of OCSLA remained untouched until 1978.[15] By the mid-1970's, however, several cross-

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[14] The Deepwater Port Act, January 3, 1975, Public Law 93-627, Sec. 19(f), 88 Stat. 2146, required the State laws applicable to OCS activities to be continually updated. *See* 43 U.S.C. § 1333, as amended (1976).

[15] Other statutes that affected OCS operations were passed during that period:

Fish and Wildlife Act of 1956 (Act of August 8, 1956, 70 Stat. 1119 as amended, 16 U.S.C. 742(a), et seq.)—Establishes the U.S. Fish and Wildlife Service to study, protect and manage the fish resources under U.S. jurisdiction.

Geneva Conventions of 1958 (Convention on the Territorial Sea and the Contiguous Zone. U.N. Doc. A/Conf. 13/L.52 T.I.A.S. 5639; Convention on the Continental Shelf, U.N. Doc. A/Conf. 13/L.55. T.I.A.S. 5578.)—Provides for a territorial sea of 3 miles, a contiguous zone up to 12 miles, and a continental shelf "to a depth of 200 meters or . . . to where the depth . . . admits to exploration . . ."

Natural Gas Pipeline Safety Act of 1968 (Public Law 90-481, 82 Stat. 720, 49 U.S.C. 1071 et seq.)—Establishes requirements for the placing of pipelines.

National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 854, 42 U.S.C. 4321 et seq.)—Provides requirements through regulations for draft environmental impact statements, hearings, and final environmental impact statements as to areas of leasing and actual leases.

Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590, 29 U.S.C. 651 et seq.)—Requires employers, including those engaged in OCS development activities, to provide a safe working environment for all employees.

Federal Water Pollution Control Amendments of 1972 (Public Law 92-500, 86 Stat. 816, 33 U.S.C. 1251 et

currents generated support for revising OCSLA.[16] The onset of the energy crisis, dramatized by the oil embargo of 1973, heightened the attractiveness of the uncertain OCS resources to those concerned with reducing this country's dependence on foreign oil supplies.[17] At the same time, local governments, environmental and citizen organizations, commercial and recreational fishing interests, and other groups expressed increasing concern over possible deleterious effects of rapid OCS development. They sought a greater voice in developing and regulating future OCS ventures.[18]

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seq.)—Limits and controls the discharge of oil or hazardous substances into or upon the navigable waters.

Marine Protection, Research and Sanctuaries Act of 1972 (Public Law 92-522, 86 Stat. 1028-1046) 16 U.S.C. 1361, 1362, 1371-84, 1401-7.)—Authorizes the designation of marine sanctuaries which may extend to the outer limit of the Continental Shelf.

Coastal Zone Management Act of 1972 (Public Law 89-545, as added Public Law 92-583, 86 Stat. 1281. 16 U.S.C. 1451 et seq.)—Provides Federal assistance to coastal States to enable them to develop and administer their own coastal management programs.

Deepwater Port Act of 1974 (Public Law 93-627. 88 Stat. 2146. 33 U.S.C. 1501 et seq.)—Provides for the regulation of the location, ownership, construction, and operation of deepwater ports beyond the territorial limits of the United States.

[16] *See generally* H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 5-6 (1980); H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 74-94 (1977).

[17] *Id.*; *see also* S. Rep. No. 95-284, 95th Cong., 1st Sess. 60-68 (1977).

[18] H.R. Rep. No. 96-1214, *supra* note 16, at 5-6; H.R. Rep. No. 95-1835, *supra* note 13, at 6-7; H.R. Rep. No. 95-590, *supra* note 16, at 74-94.

Some of these interest groups focused attention on inadequacies of the existing bidding system specified by OCSLA. In light of skyrocketing fuel prices it was asserted that the prevalent cash bonus-fixed royalty method of bidding could not assure the government a fair return on its leases, because total royalties paid to the government were declining as a percentage of gross proceeds on wells. In addition, the necessity to make extremely high "front end" cash bonus payments in order to participate in the lease sales coupled with the high risk associated with developing some OCS lots had the anticompetitive effect of limiting participation in the lease sales to only the largest concerns.[19]

Congress responded to the competing concerns for acceleration of OCS development, environmental protection, and involvement of all inherent parties in OCS development by enacting the OCSLA Amendments of 1978. With regard to lease sale bidding procedures, Congress expressly retained the two bidding systems previously authorized, but added five other specific alternatives as well as any nonenumerated bidding method the Secretary of the Interior determines to be useful to accomplish the purposes and policies of the Amendments.[20] The Secretary is required to use the enumerated alternatives to the cash bonus-fixed royalty method for not less than 20 percent but not more than 60 percent of all acreage offered for leasing each year during a five year ex-

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[19] H.R. Rep. No. 96-1214, *supra* note 16, at 14; H.R. Rep. No. 95-590, *supra* note 16, at 54, 94, 103; S. Rep. No. 95-284, *supra* note 17, at 46-47.

[20] 43 U.S.C.A. § 1337(a)(1). *See* text of alternative bidding provisions, note 7, *supra*.

perimentation period specified by the statute.[21] In addition, although the Act provides that lease sales are to be conducted by the Secretary of the Interior, it is the Secretary of Energy who, in consultation with the Secretary of the Interior, must promulgate regulations governing the use of alternative authorized options.[22] The Secretary of Energy must report to Congress annually concerning the use and nonuse of the alternative bidding options.[23] The Secretary of the Interior must also evaluate the competitive impacts of the use and nonuse of bidding options in an annual report to Congress, as well as reporting

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[21] 43 U.S.C.A. §§ 1337(a)(1), (a)(5)(B). The five year period began on September 18, 1978. The percentage limitations apply "unless the Secretary determines that the (percentages) are inconsistent with the purposes and policies of the Amendments." 42 U.S.C.A.1 § 1337(a)(5)(B). This last provision is referred to as an "escape hatch" in S. Rep. 95-284, *supra* note 17, at 73; H.R. Rep. No. 95-590, *supra* note 16, at 139.

[22] Under Section 302(b)(2) of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. § 7101 *et seq.*, the responsibility of the Secretary of the Interior to promulgate regulations implementing OCS alternative bidding systems was transferred to the Secretary of Energy. 42 U.S.C.A. § 7152(b)(2). *See* H.R. Rep. No. 95-1474, 95th Cong., 2d Sess. 77-78, 90 (1978) (Conference Report). If the Energy Secretary wishes to promulgate regulations for systems which are not described in Section 8(a)(1)(A)—(G) but instead proceeds under Section 8(a)(1)(H) (*see* note 7 *supra*) he must report the proposed system to Congress. The new system may not be used if either House passes a resolution of disapproval within 30 days. Section 8(a)(4), 43 U.S.C.A. § 1337(a)(4).

[23] 43 U.S.C.A. § 1337(a)(9).

before each lease sale of the planned use of particular bidding systems.[24] Finally, the Secretary of Interior is required to prepare and maintain a comprehensive oil and gas leasing program to implement the different policies of the Act.[25] That program must adhere to general principles spelled out in the statute, including a balanced consideration of economic, social, and environmental concerns and the assurance of a fair market value on leased land to the government.[26]

This Court's Prior Decision

Three OCS lease sales were held between the September 18, 1978 effective date of the OCSLA Amendments and the June 22, 1979 filing date of appellants' lawsuit. In each instance the Secretary of the Interior chose cash bonus-fixed royalty bidding for part of the tracts to be leased, while using another bidding system—a cash bonus system with a fixed non-linear (semi-logarithmic) sliding scale royalty[27]—for the other tracts. The Secretary planned to use the same mix of bidding systems in four more lease sales that were scheduled to occur between June and November 1979.

Appellants' suit challenged the Secretary of the Interior's continued use of the cash bonus-fixed royalty bidding system. Judge Leventhal described the thrust of the litigation:

> The essence of appellant's complaint is that cash bonus-fixed royalty bidding, particularly with the

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[24] *Id.* §§ 1337(a)(8), 1343(2).

[25] *Id.* § 1344.

[26] *Id.* § 1344(a)(1).

[27] *See* note 13 *supra.*

> royalty fixed at 16⅔%, cannot yield fair market value nor generate adequate competition as mandated by the amended OCS Act. Only through the issuance and use of regulations authorizing alternative systems, most notably the profit-sharing options, can the government achieve the statutory objectives. However, according to appellant, issuance of those regulations has been unduly delayed by a "jurisdictional squabble" between the Departments of Energy and the Interior.[28]

Appellants sought declaratory and injunctive relief leading to the suspension of all OCS leasing until the Secretary of Energy promulgated regulations governing the use of all of the alternative bidding systems authorized by OCSLA. In particular, appellants' objective was the promulgation of regulations for bidding incorporating net profit sharing. Appellants also sought an injunction against any further leasing under the cash bonus-fixed (16⅔ percent) royalty method as well as an investigation of existing leases with appropriate remedial action if it was demonstrated that the then existing leases would not return a fair yield to the government.

Before the first of the four planned 1979 lease sales appellants moved for a preliminary injunction to prevent any further sales "in the absence of regulations establishing the full range of bid systems mandated by [OCSLA]." The district court denied the motion ruling that appellants had failed to show a likelihood of success in prevailing on the merits.[29]

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[28] Energy Action Educational Foundation v. Andrus, *supra* note 2 [hereinafter "Energy Action"], slip op. at 8.

[29] Energy Action Educational Foundation v. Andrus, 479 F. Supp. 62 (D.D.C. 1979); (order denying preliminary injunction per Aubrey E. Robinson, Jr., District Judge, J.A. 293).

Appellants did not appeal this ruling, but rather, moved for modification of the order so as to enjoin the award of leases in the first scheduled sale on the basis of cash bonus-fixed royalty bidding. After bids were opened for the June 1979 sale, appellants renewed their motion for a modification, arguing that the actual bidding results contravened the Act. This motion was denied by the district court on the basis that appellants had "still failed to show that utiliaztion of the cash bonus-fixed bidding system with a 16⅔ percent fixed royalty violates" OCSLA.[30]

On appeal this court refused to grant preliminary injunctive relief. In announcing this result the court carefully limited the scope of the issue deciding to "whether the continued partial use of cash bonus-fixed royalty bidding—*as planned for the near future by the Secretary*—violates the statutory scheme." [31] (emphasis supplied). On the basis of the record at that point in the litigation the court would not say that the government's leasing activities violated the legislative scheme.[32] The opinion emphasized that while Congress anticipated the continued "substantial" use of the traditional cash bonus-fixed royalty form of bidding, "Congress [also] sought experimentation among bidding systems, usually through direct comparisons between cash bonus-fixed royalty bidding and other options, in order to obtain reliable information as to the relative advantages and disadvantages of the enumerated systems. It was hoped

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[30] Civ. No. 79-1633 (D.D.C., July 17, 1979) (order denying motion for modification per Aubrey E. Robinson, Jr., District Judge); J.A. 549.

[31] Energy Action, slip op. at 11.

[32] *Id.* at 19, 21.

that this testing would ultimately enable the Secretary to utilize the system or mix of options which emerged as superior." [33]

A reasonable timetable for achieving this mix of options was suggested in the opinion. Judge Leventhal referred to the House Committee Report's "disapproval" of the possibility that the new regulations would take up to two years to issue.[34] The opinion also noted a June 1979 GAO Report recommending that alternative bidding systems be issued "no later than January 1, 1980." Further, the opinion recognized that Congress had provided flexibility in scheduling deadlines for compliance with the 1978 Amendments. For example, the amended Act requires the preparation of a comprehensive five year oil and gas leasing program.[35] The Act provides that either after approval of that plan by the Secretary, or in any event no later than March 1980 (eighteen months following the September, 1978 effective date of the 1978 Amendments), no leases were to be issued un-

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[33] *Id.* at 13. The opinion cited to the Conference Report's language requiring "a fair selection of different methods on different tracts." H.R. Rep. No. 95-1474, *supra* note 22, at 92. *See also* H.R. Rep. No. 95-590, *supra* note 10, at 54; S. Rep. No. 95-284, *supra* note 17, at 47.

The bidding methods utilized or planned at the time of the opinion are discussed at pp. 11-12 *supra*. None of the completed or planned sales utilized the variable net profit share method specified in 43 U.S.C.A. § 1337(a)(1)(E). The subsequent development and use of regulations is discussed at pp. 17-20 *infra*.

[34] *See* H.R. Rep. No. 95-1835, *supra* note 13, at 25.

[35] 43 U.S.C.A. § 1344. The mandated comprehensive program had not been submitted at the time of the prior opinion, and was not ultimately submitted and approved until June, 1980.

less issued pursuant to the comprehensive plan. Nevertheless, Congress made it clear that leasing was to continue until the comprehensive leasing program became operation, both during the interim between enactment of the 1978 Amendments and the approval of the plan, and thereafter for so long as the plan was under judicial or administrative review.[36] The opinion concluded:

> Congress did not expect changes to take place overnight. To the contrary, it fully anticipated that an optimal comprehensive leasing plan took time—*as much as 18 months or longer*—to become operational. Accordingly, it drafted a detailed schedule for instituting the program, placing outside time limits on the completion of each stage.[37]

(emphasis supplied).

At the same time the opinion did recognize that the Secretary's leeway on timing was not boundless:

> [A]t some point in time the Secretary's delay in issuing profit-sharing regulations and in failing to experiment among alternative bidding systems more widely may constitute a violation of the OSC Act amendments.[38]

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[36] *Id.* § 1344(d)(3).

[37] Energy Action, slip op. at 16.

[38] *Id.* at 21. The opinion also implied, without deciding, that under some circumstances the government's failure to invoke the so-called "escape hatch" (*see* note 21 *supra*) to exceed the maximum limitations on the use of alternatives to cash-bonus bidding could amount to an abuse of discretion. *Id.* at 20. Support for this position is found in the Conference Committee Report which states:

> The Secretary of the Interior is given the discretion to waive the *minimum* or *maximum* requirement for the use

It merits interjecting at this point that both at the time of our earlier opinion and subsequently, the government's intentions and actual progress toward meeting a reasonable timetable for issuance of profit sharing regulations has been a source of some confusion. For example, proposed regulations dealing with profit sharing were said to be forthcoming imminently at the time of argument in the earlier case. When issued in December 1979 they dealt only with the cash bonus bidding-fixed net profit share option, option (D). But it is not at all clear whether the parties or even the court focused at the time of the earlier opinion on the fact that the forthcoming regulations were not to include variable net profit share bidding, option (E). It is also commonplace to find general references to net profit share bidding systems which do not distinguish between fixed and variable net profit options, in statements sprinkled throughout the legislative history and in the arguments of counsel and the prior opinion of this court,[39] as well as in appellees' reports to the Congress on its implementation plans as to OCSLA.[40] The fact is that neither

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of bidding systems other than bonus bidding, based on a determination that *either* the minimum or maximum percentage level is not consistent with the purposes and policies of the act.

H.R. Rep. No. 95-1474, *supra* note 22, at 93 (emphasis supplied).

[39] *See, e.g.*, Energy Action, slip op. at 11 n.29, which recites appellants' evidence offered to demonstrate the superiority of a profit-sharing bidding system over the cash bonus-fixed royalty option. Both the court's summary of the evidence, and the actual documents in the Joint Appendix refer to profit-sharing systems without specifying whether they mean *fixed* or *variable* systems.

[40] *See, e.g.*, H.R. Rep. No. 96-1214, *supra* note 16, at 49-50.

then nor now have there ever been proposed or final regulations for *variable* net profit share bidding.[41]

Subsequent Events

Since this court's earlier decisions, the Secretary of Energy has issued final regulations governing four of the seven alternative bidding schemes enumerated by OCSLA.[42] All of these four regulations, however, had been under consideration at the time of our prior decision.[43] Only one of the regulations involves a non-

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[41] The Department of Energy has "contracted" for an analysis of a bidding system with net profit share as a bidding component. Brief for Appellees at 8. Apparently this is what the district court referred to in asserting that the Department of Energy was in the process of preparing variable net profit share regulations. Civ. No. 79-1633 (D.D.C. July 17, 1980) (memorandum opinion denying motion for preliminary injunction per Norma Holloway Johnson, District Judge) [hereinafter "Mem. op."] at 7. *See* notes 47 & 50 *infra*.

[42] Final regulations for bidding systems authorized by 43 U.S.C.A. § 1337(a)(1)(A)-(C) (cash bonus bid-fixed royalty, royalty bid-fixed cash bonus, and cash bonus bid-fixed sliding scale royalty) were promulgated on February 12, 1980, 45 Fed. Reg. 9536. Final regulations for a cash bonus bid-fixed net profit share bidding system were promulgated on May 30, 1980 45 Fed. Reg. 36784.

[43] The previous experience with the three methods described in § 1337(a)(1)(A)-(C) is described at pp. 5-6, 11-12 *supra*. The fourth method, cash bonus bid-fixed net profit, had been proposed by the time of our previous decision and was the option that appellees were referring to when they stated to both Congress and the courts that regulations governing profit-sharing would be out "in the near future." *See O.C.S. Oversight of 1978 Amendments; Hearings Before the Select Committee on the O.C.S., House of Representatives*, 96th Cong., 2d Sess. [hereinafter *"Oversight Hearings"*] 493-95 (Dec. 4, 1979) ("Hearings on Promulgation of Bidding Sys-

front end cash bonus bidding system (royalty bid-fixed cash bonus option (B) and there is also unrefutable evidence on the record that appellees have now determined not to make further use of this option.[44] Indeed, the Department of Energy reported to Congress on the basis of its leasing experience in 1978 that the disadvantages of royalty bidding "are too high a price to pay for the lower cash bonuses and higher bonus participation rates expected under royalty bidding." [45]

As regards the other three untested statutory bidding systems—two of which do involve non-front end cash bonus alternatives—there has been no significant progress in issuing regulations since the prior decision of this court other than a preliminary "notice of inquiry" for comments on the development of work commitment bidding systems.[46] In particular, nothing

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tems Regulations"), *summarized in* H.R. Rep. 96-1214, *supra* note 16, at 49-50.

Appellants contend that even this fourth "new" method is not a real departure from past practice, but rather, "once again the cash bonus bidding system advantaging the biggest oil companies." Brief for Appellants at 6.

[44] Deposition of H. Theodore Heintz, Jr., Asst. Director of the Office of Policy Analysis, Department of the Interior, 334 (June 17, 1980), Energy Action Education Foundation v. Andrus, No. 79-1633 (D.D.C., Sept. 17, 1980) (Deposition filed July 15, 1980, Docket No. 59) [hereinafter "Heintz Deposition"].

[45] Department of Energy: *Report to Congress on Various Bidding Options Utilized in FY-78 Lease Sales on the OCS* 18, J.A. 232, 249.

[46] The three untested bidding systems are those specified by 43 U.S.C.A. §§ 1337(a)(1)(E)-(G). The Department of Energy issued a notice of inquiry and requested comments on the development of bidding systems with a work commitment

has been done as to the critical variable net profit share bidding system; the record shows only a representation by appellants that a "contract for analysis" (content and completion date unknown) was let out in the summer of 1980.[47]

Meanwhile, the comprehensive five year leasing plan as mandated by section 18 of the Act[48] has been approved and thirty six lease sales scheduled under its terms. Three such sales were scheduled for the end of 1980 and one of these occurred shortly after argument of the present appeal.[49] The next six sales are

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component authorized by 43 U.S.C.A. §§ 1337(a)(1)(B), (C) & (G) in a notice published July 25, 1980, 45 Fed. Reg. 49586.

[47] In a deposition taken in June, 1980, an Interior Department official admitted that no proposal for regulating net variable profit sharing bidding was expected any time soon. Heintz Deposition, *supra* note 44, at 111 (June 16, 1980). At argument appellees admitted that no regulations on variable net profit share bidding would issue this year or in the immediate future. Indeed, appellees conceded that there was no timetable for their issuance at all.

This is consistent with appellees' position that OCSLA does not require the promulgation of any specific bidding system, and that there is no statutory duty to issue all the regulations by any specific time. *E.g.*, Brief for Appellees at 20.

No timetable for promulgation of this regulation was reported to the House Select Committee on OCS Oversight in 1980. *Oversight Hearings, supra* note 43, at 1272 (May 15, 1980).

[48] 43 U.S.C.A. § 1344.

[49] Sale A62 in the Gulf of Mexico took place on September 30, 1980. That sale involved cash bonus bidding with a fixed 33½ percent royalty in 22 tracts, cash bonus bidding with a fixed sliding scale royalty on 59 tracts, cash bonus bidding with a fixed net profit share of 50 percent on 40 tracts, and

currently planned to be held in consecutive months beginning in May 1981. If appellees continue on their course, it seems evident that 1981 will pass, and with it over one-half of the five year statutory period for experimenting with bidding alternatives and over one-third of the five year comprehensive leasing program, with no experimentation with variable net profit share bidding. The prospects for expecting such experimentation are further dampened by appellees' refusal to recognize any statutory obligation to issue regulations on variable net profit share bidding by any specific time or indeed any time at all.[50]

III. Analysis

Before the trial court, both sides moved for summary judgment. Apellants sought partial summary judgment or, in the alternative, a preliminary injunction, on the grounds that the government was in

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cash bonus bidding with a fixed 16⅔ percent royalty on 71 tracts. 45 Fed. Reg. 55932 (Aug. 21, 1980).

Proposed sale notices have been issued for sale 55 in the Eastern Gulf of Alaska, 45 Fed. Reg. 37895 (June 5, 1980), scheduled for October 21, 1980, and sale 62 in the Gulf of Mexico, 45 Fed. Reg. 45872 (July 7, 1980), scheduled for November 1980.

For sale 55 the Secretary proposed cash bonus bidding with a fixed sliding-scale royalty on 32 tracts, cash bonus bidding with a fixed net profit share of 40 percent of 88 tracts, and cash bonus bidding with a 16⅔ percent royalty on the remaining 90 tracts.

For sale 62 the Secretary proposed cash bonus bidding with 33⅓ percent royalty on 11 tracts, cash bonus bidding with a fixed net profit share of 50 percent on 22 tracts, and cash bonus bidding with a 16⅔ percent royalty on 38 tracts.

[50] *See*, notes 41 & 47 *supra*. There appears to be no support for the district court's asserting that "defendants state that the Department of Energy is in the process of preparing regulations for the variable net profit share bidding system." Memo. op. at 7.

violation of the Act because it still had not developed regulations for all of the bidding systems as required by OCSLA. In turn, the government appellees moved for summary judgment; first on the ground that the Act did not require promulgating all of the authorized regulations before further lease sales took place, and, second, on the ground that the continued use of cash bonus-fixed royalty bidding did not amount to an abuse of discretion. In moving for judgment on the first issue the government relied on two independent arguments: (1) OCSLA does not require issuance of regulations for all or any particular bidding system(s), and (2) even if OCSLA imposes an obligation to issue regulations on all the specified bidding systems, appellees are proceeding at a reasonable pace toward fulfilling this duty.

After the case was reassigned,[51] the district judge denied all the motions for summary judgment and appellants' motion for a preliminary injunction. The articulated reason for the refusal to grant the summary judgment motions was that the court found a genuine factual issue existed as to whether OCSLA requires the issuance of regulations for all the enumerated bidding systems before further leasing activity can take place.[52] Since, along with both parties,[53] we

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[51] Following a May 16 status conference before Judge Robinson, the parties filed their motions. The case was then transferred to recently appointed District Judge Johnson.

[52] In denying appellants' motions the district court explicitly offered this reason, Mem. op. at 9, while in a separate order denying defendants' motion the court noted the existence of material facts in dispute generally, without explicitly identifying the nature of the factual disputes. Energy Action Educational Foundation v. Andrus, No. 1633 (D.D.C., Sept. 17, 1980) (order denying appellees' motion for summary judgment).

[53] Brief for Appellee at 16 n.9; Brief for Appellant at 24.

disagree with her conclusion that this is a factual issue which precludes granting summary judgment rather than a legal issue as to the Secretaries' obligations under OCSLA, we find it necessary as well as appropriate to construe OCSLA as it relates to the requirement to issue regulations on alternative bidding systems. Although cognizant of the absence of either a final judgment or certification pursuant to 28 U.S.C. § 1292(b) we nonetheless perceive no interests to be served by further delaying consideration of the basic statutory issue dominating this protracted litigation, a question of law which cannot be illuminated by the development of additional facts at trial. Reaching the critical legal issue now not only serves the interests of judicial economy, but provides essential guidance for the ongoing litigation upon remand.

We feel justified in reaching this issue in order to decide the appeal of the refusal to enjoin the 1981 lease sales, which was not disposed of by our order of September 29, 1980. There is no question that jurisdiction exists to decide issues related to the surviving portion of the appeal from the denial of the preliminary injunction.[54]

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[54] 28 U.S.C. 1292(a)(1). Courts, of course, are reluctant to consider the merits of the case on an appeal from an interlocutory order. *See, e.g.*, SEC v. Senex Corp., 534 F 2d 1240, 1241 (6th Cir. 1976); Industrial Bank of Washington v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968); Young v. Motion Pictures Ass'n, 299 F.2d 119, 121 (D.C. Cir. 1962). They undoubtedly have jurisdiction to do so, however, under section 1292(a)(1), E.P. Hinkle & Co., Inc. v. Manhattan Co., 506 F.2d 201, 204 (D.C. Cir. 1974):

> Review quite properly extends to all matters inextricably bound up with the remedial decision. . . . [T]he scope of

The basis for the district judge's denial of a preliminary injunction as reflected by her analysis of the likelihood that appellants would succeed on the merits, rested in substantial part on her view that OCSLA imposes no obligation on the Secretaries to issue regulations or to experiment with net profit share bidding so long as they "retreat from the sole and exclusive use of the cash bonus-fixed royalty bidding system and . . . develop and use other systems which promise to meet the goals and policies of the

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review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.

16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 3921 at 17 (1977).

Thus the Supreme Court has allowed a court of appeals to consider a motion to dismiss that was denied by the district court, when the motion was associated with an appealable interlocutory order, Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940); so long as the decision on the merits is clear, judicial economy is obviously served by issuing a decision that will terminate or expedite the litigation. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 52-53 (1938); Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897). Courts of appeals have similarly issued merits decisions to help guide the course of litigation on remand. Hagopian v. Knowlton, 470 F.2d 201, 207 (2d Cir. 1972), or entered judgment for the plaintiff when the record demonstrated the pointlessness of further argument below, Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966). The Court, however, must restrict its merits decisions to issues that are closely related to the interloctutory order on appeal. Ex Parte National Enameling & Stamping Co., 201 U.S. 156 (1906).

1978 Amendments." [55] Accordingly, we proceed with an interpretation of the relevant portions of OCSLA, as they relate to the Secretary's duty to issue regulations on alternative bidding systems, particularly the variable net profit option specified in section 8(a)(1)(E) of the Act.

OCSLA's Mandate to Experiment With Alternative Systems

The purpose of section 8 of OCSLA is clear. Section 8 mandates the Secretary of the Interior to experiment over a five year period with alternative systems for OCS lease sales other than front end cash bonus bidding. The objective of the required experimentation is to arrive at the optimal system or systems in order:

> (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition.[56]

To that end, the Secretary is authorized to utilize the seven specific bidding systems set out in section 8.[57] To further his experimental goals, he is also authorized to require bidders to bid under more than one system simultaneously "in order to obtain statis-

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[55] Mem. op. at 11.

[56] Section 102(2), 43 U.S.C.A. § 1802(2).

[57] *See* note 7 *supra.*

tical information to determine which bidding alternatives will best accomplish the purposes and policies of this subchapter." [58]

There is no issue as to the Secretaries' duty to experiment with alternative systems to traditional front end cash bonus bidding—the government terms it "uncontested" that the "Secretaries of Energy and Interior are obligated to experiment with alternative leasing systems to eventually determine the best possible approach to the development of gas and oil" in offshore reserves.[59] And indeed the legislative history of the Amendments is replete with assertions to that effect. For example, the House Committee Report states:

> The leases have [in the past] been awarded by auction, traditionally on the basis of cash bonus bids. With the present shortage of investment capital that will prevail for many years, increasing risks of uncertainty, and the increasing integration and concentration of energy industries, there is now doubt whether cash bonus bidding remains the best system for the future. One purpose of H.R. 1614 is to authorize alternative leasing arrangements and *require experimentation with them.* It will enable the Secretary of the Interior, who administers the federal leasing program, to strike a proper balance between securing a fair return to the Federal Government for the lease of its lands, increasing competition in exploitation of resources, and providing the

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[58] 43 U.S.C.A. § 1337(a)(5)(A).

[59] Brief for Appellees at 20.

> incentive of a fair profit to the oil companies, which must risk their investment capital.[60]

(emphasis supplied).

It was never in doubt that the purpose of section 8's authorization of the seven bidding options was to foster experimentation with a five year period with new alternatives to the traditional cash bonus-fixed royalty bidding system:

> The obvious intention of the committee in revising the procedures for use of new bidding systems is to determine what system or systems in what situations, provide the best means to lease

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[60] H.R. Rep. No. 95-590, *supra* note 16, at 54. Throughout consideration of the bill the Secretary of the Interior reiterated that "this Department is firmly committed to *substantial* use of bidding systems other than the existing cash bonus system." (emphasis supplied). *See, e.g.*, S. Rep. No. 95-284, *supra* note 17, at 155, 110, 146. (Letters from Secretary Andrus to Chairman Jackson); *see also id.* at 119 (Statement of John O'Leary, Administrator, Federal Energy Administration) ("I can assure you that under this Administration *a variety of new systems* will be used") (emphasis supplied). *But see* the post-enactment testimony at *Oversight Hearings*, *supra* note 43, at 580 (Feb. 6, 1980) (Statement of Dr. John Sawhill, Deputy Secretary, Department of Energy) ("I am not sure it is appropriate for us to issue regulations in every area. I don't think we should issue regulations just for the sake of issuing regulations. On the other hand, I do think we have to be more aggressive.") *and id.* at 1289 (May 15, 1980) (Statement of R. Dobie Lagenkamp, Deputy Asst. Secretary, Oil, Natural Gas and Shale Resources, Department of Energy) ("the congressional mandate is clear and I think in another year or so we may be able to pass some judgments on the alternative bidding systems. They are not going to be used universally. They are going to be used on an experimental basis.").

> our federal resources in the Outer Continental Shelf. Subsection (a) is intended to provide procedures to answer this question. . . . to *mandat[e] use of new systems, to insure they are tested and studied,* and to provide for random selection, to insure fair tests and studies, . . .[61]

(emphasis supplied). The Senate Committee Report was in accord that section 8's purpose was "to assure *that the new leasing systems would be tried.*" [62] (emphasis supplied).

The Conference Committee Report also stressed the obligation of the Secretary to test the new leasing systems. In rejecting a House provision that tracts utilizing different bidding systems be selected on a "random" basis, the Conference Report nonetheless admonished:

> Although there is no requirement for random selection, the Secretary, in setting forth systems for use on tracts, shall seek to secure a fair selection of different methods on different tracts. The purpose of such a selection is *to assure that adequate information is obtained as to relative advantages and disadvantages of the various bidding systems,* including the front-end bonus bid systems as applied to different types of tracts, having different expectations of the amount of hydrocarbon that can be recovered.[63]

(emphasis supplied).

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[61] H.R. Rep. No. 95-590, *supra* note 16, at 140. *Cf.* Minority Views, *id.* at 302-3 (objecting to the *mandatory* use of new bidding systems).

[62] S. Rep. 95-284, *supra* note 17, at 47, 73.

[63] H. Rep. No. 95-1474, *supra* note 22, at 92.

The government's contention, as we understand it, is that although there is a generalized obligation to experiment, the Secretary is free to choose to experiment with some but not other bidding system options. We do not believe that the legislative history supports this position insofar as it would allow him to ignore the options that do not involve front end cash bonuses as the bidding variable. Rather, it strongly suggests to us that Congress was particularly interested in assuring that the non-cash bonus variable bidding systems be tried at least during the five year period to determine their potential to attract bidders other than the major oil companies who had dominated the bidding under the pre-1978 OCSLA system.

Thus the Senate Committee Report emphatically stated:

> [The proposed act] authorizes a wide variety of *new bidding systems.* These are designed *to reduce the front end cash bonus,* increase the government's return on actual production of oil or gas, make it easier for smaller companies to enter the OCS development business, and increase the availability of funds for exploration.[64]

(emphasis supplied).

The mandate of the House Committee Report was equally vigorous: "It was the intention of the Committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid." [65]

Both the Senate and the House Committee Reports state:

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[64] S. Rep. No. 95-284, *supra* note 17, at 46.

[65] H.R. Rep. No. 95-590, *supra* note 16, at 139.

> The basic thrust of all these new options is to *reduce the reliance on large front-end cash bonuses* as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would *encourage the widest possible participation in competitive lease sales* consistent with receipt by the public of fair market value for its resources. The committee believes that [*net profit share* and other] arrangements can be effective in shifting Government revenue *away from initial bonuses* and into deferred payments made out of a lease-holder's profits based on actual production of oil or gas.[66]

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[66] S. Rep. No. 95-284, *supra* note 17, at 73; H.R. Rep. 95-590, *supra* note 16, at 139. Material in brackets appears in Senate Report only. The Senate Report noted that while

> These alternatives may not be "the perfect solution" . . . they should facilitate entry into the OCS development business of more independent producers and are certainly worth trying on an experimental basis.

S. Rep. 95-284, note 17, at 47. The House Report noted testimony:

> that the high front end bonus bids may have created a barrier to the entry of small and medium-sized oil firms as well as other potential exploiters to the OCS activity, and that these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government.

H.R. Rep. 95-590, *supra* note 16, at 138-39. And the House Report stated that:

> To increase competition for offshore leases and secure higher returns to the public Treasury, section 8 of the Outer Continental Shelf Lands Act has been amended to allow the Secretary *to use other bidding methods based on net profits; royalty; or work commitments stated in dollar amounts.*

Id. at 47 (emphasis supplied).

The Conference Report also adopted the basic thesis that:

> Bidding systems *other than bonus bidding, including royalty, net profit, work commitment, and nonenumerated systems* (emphasis supplied), are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in all OCS areas during each of the next 5 years.[67] (emphasis in original).

In view of these statements, we find it difficult to give credence to a view of the Act which would permit the Secretaries to totally ignore prominently mentioned new noncash bonus bidding alternatives without any testing at all, even if they have otherwise satisfied OCSLA's minimum percentage requirement for experimenting with new leasing systems.

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[67] H.R. Rep. No. 95-1474, *supra* note 22, at 92. *See also* H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. 15 (1979) (Interim Report on the Activities of the Select Committee on the OCS During the 95th Congress); H.R. Rep. No. 96-1214, 96th Cong., 2d Sess. 14 (1980) (Final Report on the Activities of the Select Committee on the OCS) which both state:

> The 1978 Amendments provide for the use of *new* bidding systems including *variable* royalty, *variable net profit, fixed net profit,* and *work commitment bidding alternatives.* It [is] hoped that these new systems will increase OCS competition, more efficiently allocate scarce capital, and increase ultimate resource recovery.
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> * * * * *
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> Bidding systems *other than bonus bidding, including royalty, net profit, work commitment,* and nonenumerated systems are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in all OCS areas during each of the next 5 years.

(emphasis supplied).

Indeed we note that at one point in the legislative history of the 1978 Amendments, a proposed amendment was defeated on the House floor that would have allowed the Secretary "complete flexibility" to decide whether or not to issue regulations or utilize any specific alternative bidding systems. Representative Murphy, House manager of the bill, was adamantly opposed on the ground that "this amendment strikes at the very heart of this bill-promotion of competition." [68]

Representative Murphy objected strongly for the following reasons:

> During its almost 3 years of hearings, the committee heard repeatedly about the lack of competition in offshore leasing. In fact, the reason for this lack of competition is because of the present bidding system—the use of high front-end bonus bids which create a barrier for the entry of small and medium-sized oil firms as well as other potential exploration and development companies. . . . After much discussion, and much debate, the committee decided to include many new bidding options as part of the Outer Continental Shelf Lands Act.
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[68] *See* 124 Cong. Rec. H420-32 (daily ed. Jan. 31, 1978). Rep. Treen introduced an amendment which would have allowed the Secretary to

> propose any of the seven new bidding systems described in the committee bill, or any other new bidding system the Secretary wants to provide for. He *may* provide for these by regulation, but we do not mandate any particular new system . . . . He does not have to use any of these systems at all.

(emphasis supplied).

> This mandate of use of new bidding systems is strongly supported by the present Carter administration. *Recognizing the need to not only to experiment but use new bidding systems, the Secretary of the Interior has repeatedly stated to our committee that he believes that having such a mandate will be a positive incentive to doing extensive and detailed background, experimentation, and followup on new bidding systems.*
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> * * *
>
> The present provision therefore provides an incentive to use new bidding systems, and sufficient flexibility to the Secretary of Interior to experiment, study and finalize the use of the new bidding system. . . .[69]

(emphasis supplied).

During the debate that preceded defeat of the aforementioned amendment, numerous legislators, from both the majority and minority parties, reiterated their belief that experimentation with new non-cash bonus bidding systems was and should remain mandatory under the bill.[70]

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[69] *Id.* at H420-21.

[70] *Id.* at H421 (remarks of Rep. Miller) ("I think we see with the increase in royalty bidding, with the increase in net profit sharing, and with sliding royalties, that for the first time we will have major competition."); *Id.* at H423 (remarks of Rep. Rousselot) ("These experimental systems should be used but we should remember that they are just that—experimental. The Secretary should be mandated to use them in order to conduct experiments to determine their worth; however, the percentage of use should be smaller . . . ."); *Id.* at H424 (remarks of Rep. Miller) ("I suggest we give the Secretary the mandate to go out and use these

We conclude therefore from a reading of the legislative history that the Secretary of Energy does have a statutory obligation to promulgate regulations on the major alternatives to front end cash bonus bidding, including the variable net profit share bidding option so as to allow experimentation with such a

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alternative . . . systems, so we can get the greatest amount of participation and also have the greatest chance of producing revenues"); *Id.* at H425 (remarks of Rep. Brown) ("Only by experimentation will the suitability of the various bidding systems become known"); *Id.* at H425 (remarks of Rep. Hughes) ("Why we in this legislation directed the Secretary to utilize the alternative systems is because we want to give the alternative systems a fair chance, something they have not had in this country in the entire 25 years of oil and gas development in America. We want to give these other systems a fair trial"); *Id.* at H426 (remarks of Rep. Hughes) ("But I think the fact of the matter is that we need to send a clear signal to the Secretary of the Interior to utilize in a realistic fashion during the next 5 years systems other than the bonus bidding systems"); *Id.* at H427 (remarks of Rep. Fish) ("These experimental systems should be used. There is, once again, no dispute between the minority and the majority on that subject, but we should remember the new alternative, experimental systems are just that—experimental. The Secretary should be mandated to use them in order to conduct experiments but the percentage must be smaller than is proposed in the committee bill . . . ."); *Id.* at H429 (remarks of Rep. Murphy) "The language in the bill at the present time requires competition in the leasing arrangements on the Continental Shelf . . . . At the present time we find almost 100 percent of the bidding is the bonus-bid, upfront, big cash-expenditure type of bidding that dominates the sale of tracts in the Outer Continental Shelf. The purpose of the committee saying that the Secretary should utilize alternate forms of bidding for only 5 years is that after 5 years the Secretary will have made his analysis as to which are the most cost-effective methods of bidding on the public lands.")

system to take place during the five year period specified for such experimentation.[71]

The Pace of Implementing OCSLA

As of this date, over two years after passage of the Act, regulations have not been issued nor consequently has there been any experimentation with three of the seven bidding systems enumerated in OCSLA, two of which do not involve cash bonus bidding.[72] The government has argued strenuously, nonetheless, that Congress in its oversight capacity has condoned the failure to experiment with or issue regulations on variable net profit or work commitment bidding systems. Congress has kept abreast of the development of the OCSLA bidding systems, primarily through the activities of a House Select Committee on OCS Oversight ("Oversight Committee").[73] Appellees would imply Congressional approval as to their pace in implementing OCSLA by virtue of the Oversight Committee's silence. It is, of course, the earlier Congressional *action* in adopting OCSLA rather than subsequent Congressional *inaction*, to which we must look primarily for reliable guidance

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[71] A prerequisite to the mandated experimentation is issuance of a regulation. Regulations have not been issued at this time for the alternatives specified in sections 8(a)(1)(E)-(G). *See* note 7 *supra*. The Act also requires the Secretary of Energy to report to Congress on the nonuse of bidding systems in an annual report mandated by section 8(a)(9) of OCSLA. 43 U.S.C.A. § 1337(a)(9).

[72] *See* note 71 *supra*. Cash bonus bidding is not involved in alternatives specified in paragraph (E) and (G) of section 8(a)(1). 43 U.S.C.A. §§ 1337(E), (G).

[73] *See generally* H.R. Rep. No. 96-1214, *supra* note 16, esp. at 22-56.

in determining the scope of appellees' obligations under the Act.[74] But, even if we are to weigh the expressions of a post-enactment committee significantly on the intent of an earlier Congress that passed the legislation, we find little sustenance in the hearings and report of the Oversight Committee on this specific issue. In its 1979 report the Oversight Committee warned: "If sales are less than competitive, *if new systems are not used*, if fair market value is not obtained, action might be necessary."[75] (emphasis supplied). It anticipated that "During the next two years, *new regulations are to be promulgated*, new leasing programs prepared, *new bidding systems established and applied*. . . . During the next two years most frontier areas will be leased and exploration in some frontier areas substantially completed."[76] (emphasis supplied).

In December, 1979 the Committee held hearings on the implementation of alternative bidding systems and was told by Energy officials that "in the near future [Energy] will be published final regulations dealing

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[74] In general, "'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'."

CPSC v. GTE Sylvania, Inc., 100 S. Ct. 2051, 2060-61 (1980) (*quoting* United States v. Price, 361 U.S. 304, 313 (1960)). There is, however, reason to give somewhat greater weight than usual to the views of a post-enactment oversight committee charged with responsibility for supervising the administration of the Act. It is also noteworthy that in this present case the Chairman of the Oversight Committee, Rep. Murphy, was also the floor manager of the House bill.

[75] H.R. Rep. No. 95-1835, *supra* note 13, at 14.

[76] *Id.* at 25.

with alternative bidding systems."[77] In those same hearings, one of appellants here, Energy Action Educational Foundation, urged issuance of regulations dealing with both fixed and variable net profit share bidding, while Energy and Interior officials informed the Committee of their progress on fixed net profit share bidding and other alternatives avoiding any mention of variable net profit bidding at all.[78] The final report of the Oversight Committee then concluded that "the implementation process has proceeded reasonably well, but there have been delays as exemplified by the jurisdictional conflict between [Interior] and [Energy]"; it recommended, accordingly, "interagency coordination must be enhanced . . . and the issuance of [Energy] regulations in its five major

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[77] H.R. Rep. No. 96-1214, *supra* note 16, at 49.

[78] *See* Oversight Hearings, *supra* note 43, at 448 (Nov. 15, 1979), 810 (April 15, 1980), 910 (April 29, 1980) (Statements of Edwin Rothschild, Director, Energy Action Educational Foundation); *and* at 494-95 (Dec. 4, 1979). (Statement of R. Dobie Langenkamp, Deputy Asst. Secretary Oil, Natural Gas and Shale Resources, Department of Energy); at 542, 545 (Feb. 6, 1979) (Statement of Cecil D. Andrus, Secretary, Department of Interior); at 580 (Feb. 6, 1980) (Statement of John Sawhill, Deputy Secretary, Department of Energy).

Regulations for some form of work commitment bidding system were reported to be under consideration and scheduled for promulgation in fiscal year 1981. *Id.* at 810 (April 15, 1980), 920 (April 29, 1980) (Statement of Edwin Rothchild); *id* at 1270 (May 15, 1980) (Statement of R. Dobie Langenkamp) work commitment bidding system will be out "sometime in the fall"); at 1272 (May 15, 1980) (Timetable for Issuance of OCS Regulations) (Regulation for work commitment system projected Dec. 1980).

areas of responsibility [should take place] by January 1, 1981." [79]

It is thus difficult for us to construe the Oversight Committee's statements as excusing appellees what we construe as a statutory obligation to issue regulations necessary to allow all bidding options under section 8 to be tested in some fashion during the five year "experimental" period. It seems more likely to to us that the Oversight Committee (either intentionally or unintentionally) simply avoided directly resolving any implicit conflict between Energy Action's plea for action and the Department of Energy's silcence with respect to issuance of regulations on variable net profit bidding. We must, consequently, look almost entirely to the original legislative history preceding enactment for our guidance and we construe that history as requiring good faith experimentation with non-cash bonus alternatives.

We also note that appellees have never, in fact, stated in the annual reports to Congress required by the Act that they do not intend to utilize a variable net profit bidding system.[80] In contrast the Depart-

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[79] H.R. Rep. No. 96-1214, *supra* note 16, at 70.

[80] *See* Department of Energy: *Report to Congress on Various Bidding Options Utilized in FY-79 Lease Sales on the OCS;* and the FY-78 Report, *supra* note 45, J.A. 232. These annual Energy Reports are prepared pursuant to 43 U.SC.A. § 1337(a)(9), which provides:

> (9) Within six months after the end of each fiscal year, the Secretary of Energy, in consultation with the Secretary of the Interior, shall report to the Congress with respect to the use of various bidding options provided for in this subsection. Such report shall include—
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> (A) the schedule of all lease sales held during such year and the bidding system or systems utilized;

(B) the schedule of all lease sales to be held the following year and the bidding system or systems to be utilized;

(C) The benefits and costs associated with conducting lease sales using the various bidding systems;

(D) If applicable the reasons why a particular bidding system has not been or will not be utilized; and

(E) if applicable, the reasons why more than 60 per centum or less than 20 per centum of the area leased in the past year, or to be offered for lease in the upcoming year, was or is to be leased under the bidding system authorized by subparagraph (A) of paragraph (1) of this subsection.

See also Department of the Interior: *OCS Oil and Gas Leasing: An Annual Report on the Leasing and Production Program, Fiscal Year 1979* (October 20, 1980) *and Fiscal Year 1978* (December 1979). The Interior Reports are prepared pursuant to 43 U.S.C.A. § 1343(2), which provides:

§ 1343. Annual reports by Secretary to Congress

Within six months after the end of each fiscal year, the Secretary shall submit to the President of the Senate and the Speaker of the House of Representatives the following reports:

* * * * *

(2) A report prepared after consultation with the Attorney General, with recommendations for promoting competition in the leasing of outer Continental Shelf lands, which shall include any recommendations or findings by the Attorney General and any plans for implementing recommended administrative changes and drafts of any proposed legislation, and which shall contain—

(A) an evaluation of the competitive bidding systems permitted under the provisions of section 1337 of this title, and, if applicable, the reasons why a particular bidding system has not been utilized;

(B) an evaluation of alternative bidding systems not permitted under section 1337 of this title, and

ment of Energy has utilized the end of the year report to announce its dissatisfaction with royalty bidding.[81]

Appellees also argue that because "the basic thrust of *all* these new options is to reduce the reliance on large front end cash bonuses as a means of obtaining a fair price for the public's property," [82] it is sufficient to utilize only some of the enumerated bidding methods. Again, the legislative history is too emphatic about the prominent role of the new, and as yet untried non-front end cash bonus options to permit so liberal an interpretation of the mandate on

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why such system or systems should or should not be utilized;

(C) an evaluation of the effectiveness of restrictions on joint bidding in promoting competition and, if applicable, any suggested administrative or legislative action on joint bidding;

(D) an evaluation of present measures and a description of any additional measures to encourage entry of new competitors; and

(E) an evaluation of present measures and a description of additional measures dealing with supplies of oil and gas to independent refiners and distributors.

See H.R. Rep. No. 95-1835, *supra* note 13, at 30:

> Use of new systems can be avoided by the Secretary of Interior in certain circumstances. *Congress must assure that new systems are effectively utilized or if not used that adequate reasons are detailed.*

(emphasis supplied).

[81] *See* Energy's FY-78 Report, *supra* note 84, at 18, J.A. 232, 249. Appellees' annual reports also have not invoked the so-called "escape hatch" clause of section 8(a)(5)(B) of the Act. *See* note 21 *supra*.

[82] Brief for Appellees at 31, *citing* S. Rep. No. 95-284, *supra* note 17, at 139 (quotation at 73).

experimentation. It may well be that one or more of these new options, when tested may prove unsatisfactory, but it is not credible that the Secretaries can permissibly reject them out of hand, when the statutory history is explicit regarding Congressional interest in maximizing competition and encouraging "the widest possible participation" in lease sales.

Alternatives like the variable net profit share bidding option (and the work commitment bid system) are designed to reduce front end cash payment and to stimulate competition to a greater degree than the options already in place which still focus bidding on the front end cash bonus. Although we obviously cannot determine at this point whether the non-cash bonus variable systems will have the salutory effect in practice that their supporters claim, acquiring this information is precisely the objective of the Congressionally mandated experimentation with new systems.

It is also clear to us that the obligation to experiment with "net profit share" bidding so frequently referred to in the Committee reports and floor debate is not fully satisfied solely through experimentation with *fixed* net profit share bidding. The statute itself sets out as distinct alternatives two types of net profit share bidding—fixed and variable—to be experimented with in the five year period. The variable net profit bidding alternative represents the more innovative alternative, and the greater departure by far from the traditional cash bonus system. The separate provision for the variable net profit share bidding alternative in section 8(a)(1)(E) did not materialize out of thin air; its origins may be traced to specific testimony and dialogues between legislators and witnesses about this particular type of bidding while OCSLA was pending before Congress.

During the hearings several witnesses and legislators exhibited significant interest in and knowledge of *variable* net profit share bidding;[83] comparisons were made between variable royalty and variable net profit options; comparisons which usually favored variable net profit bidding.[84] Discussions were also held on the differences between variable net profit share bidding and variable cash bonus-fixed net profit share bidding.[85] The testimony about variable net profit

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[83] *See, e.g., Hearings Before the Ad Hoc Select Committee on the Outer Continental Shelf on H.R. 1614 (House of Representatives)*, 95th Cong., 1st Sess. (1977) [hereinafter *"House Hearings on H.R. 1614"*] at 784-89 (statement of Dr. Walter Mead, Dept. of Economics, U.C. at Santa Barbara); and 941 (statement of T. F. Hart, Vice President, Shell Oil Co.); at 1091, 1106-20 (statement of Richard H. Bowerman, Associated Gas Distributors); at 1197 (statement of John T. Loftis, Jr., Senior Vice Pres. Exxon Oil Co.) at 1491-1500 (statements of Lynn Adams and William Miller, Domestic Petroleum Council); *and see Hearings Before the* Committee on Energy *and Natural Resources on S. 9, 95th Cong., 1st Sess. (1977) (Senate)* [hereinafter *"Senate Hearings on S. 9"*] at 231 (colloquy between Robey Clark, Diamond Chemical Oil, and Sen. Johnston); at 286 (colloquy between Lynn Adams, Domestic Petroleum Council, and Sen. Johnston); at 369-72 (colloquy between T. F. Hart and Sen. Johnston); at 530 (statement of Robert LaResche Commissioner of Natural Resources, State of Alaska).

[84] *House Hearings on H.R. 1614, supra*, note 83, at 1496-1501. The Domestic Petroleum Council presented a detailed analysis of cash bonus bidding, net profit bidding, and royalty bidding that concluded "royalty bidding is the least attractive." *Id. at* 1499. *See Senate Hearings on S. 9, supra* note 83, at 286 (statement of William Miller) ("no question" net profit variable bidding is better than gross royalty variable bidding).

[85] *See, e.g., Senate Hearings on S. 9, supra* note 83, at 372 (statement of T. F. Hart, Shell Oil Co.) (fixed net profit option is an "entirely different story" from variable net profit bidding, "a situation . . . we can live with.").

bidding was by no means all favorable; concerns were expressed that it would encourage irresponsible bidders; discourage perservance in drilling; would be costly and complicated to administer and involve the government too deeply in the oil and gas business.[86] Yet even some of its vigorous opponents suggested it might prove useful and attractive for particular tracts.[87] Representatives of the gas distribution industry, among others, affirmatively advanced a variation of this option.[88] Senator Johnston questioned

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[86] *See, e.g., House Hearings on H.R. 1614, supra* note 83, at 784-789 (statement of Dr. Mead, Dept. of Economics, U.C. at Santa Barbara); at 941 (statement of T. F. Hart, Shell Oil Co.); at 1197 (statement of John Loftis, Exxon Oil Co.); at 1493-1495 (supplementary statement of Domestic Petroleum Council). *But compare Senate Hearings on S. 9, supra* note 83, at 530 (statement of Robert LaResche, Commissioner of Natural Resources, State of Alaska); *House Hearings on H.R. 1614, supra* note 83, at 1234 (statement of James F. Flug, Energy Action Committee); at 1085, 1091, 1106-20, 1136-37 (statement of Richard Bowerman, Associated Gas Distributors).

[87] *Senate Hearings on S. 9, supra* note 83, at 371 (colloquy between T. F. Hart and Sen. Johnston):

> Senator Johnston. You are making a very strong case here, Mr. Hart. Does that mean in all cases it would never be a good thing to have discretionary net profit bidding?
>
> Mr. Hart. I can envision, and we can build this case for you, a few windows in this picture, and this would have to do with critical sizes of fields founds and critical costs of platforms, where net profits might be somewhat more attractive in the sense we go for the oil rather than if we had bonus bid. Small windows, and by definition, marginal fields.

[88] *House Hearings on H.R. 1614, supra* note 83, at 1111 (statement of Richard H. Bowerman, Associated Gas Dis-

several witnesses specifically about the variable net profit share method.[89] Although subsequent to enactment the distinction between fixed and variable profit sharing options seems at times to have blurred,[90] the pre-enactment record reveals a clearer focus, among key witnesses and legislators, on the two distinct options dealing with profit share bidding, a recognition ultimately reflected in the express language of section 8 of the Act. Particularly in light of assurances by administration witnesses that "all" alternative options to cash-bonus bidding would be tried[91] we do not think it a reasonable construction

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tributors) (variations of net profit bidding would "increase the opportunity for participation in the most promising remaining exploration areas, the offshore, by the distribution company, the element of the gas industry whose interest in new gas supply most closely approaches that of the consumer and the federal government. . . .").

[89] *Senate Hearings on S. 9, supra* note 83, at 245, 286, 371.

[90] *See* pp. 16-17 *supra*. During the post-enactment hearings of the Oversight Committee, Energy did, however, specify that the imminently expected regulations on "net profit share bidding" involved cash bonus as the bid variable with net profit share at a fixed rate. *See Oversight Hearings, supra* note 43, at 494-95 (Dec. 4, 1979) (prepared statement of R. Dobie Langenkamp, Deputy Asst. Secretary, Oil, Natural Gas and Shale Resources, Dept. of Energy).

[91] *See, e.g., House Hearings on H.R. 1614, supra* note 83, at 204. Secretary Andrus stated:

> While administrative flexibility is desirable, I am not concerned about the percentage mandate because of my *commitment* to *substantial* use of bidding systems other than the cash bonus system.
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> * * * * *
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> Given our committment to insuring the bidding systems used are the best available, the Department is con-

sidering alternatives to identify those systems which should be tried first. Such alternatives include *profit sharing systems*, several variations of royalty bidding systems, and the Phillips plan . . . *The Department will develop a program for testing and using these systems* even if a limit is not placed on the use of cash bonus bidding.

Id. (emphasis supplied).

John O'Leary, Administrator, Federal Energy Administration stated:

I think that we should do everything in our power to foster competition for leases. We should have a very deep support for the variations on the existing themes of leasing, and I believe there should be a more open system here with more people capable of coming in and getting positioned to develop this resource. I think we should have broad latitude to scrap the present system if it does not work, to keep it in place if it does *after a very very hard examination of all the alternatives.* Comparing our system with the system employed by European states with regard to the North Sea, they have achieved a successful result without their using the sort of competitive techniques that we have. This does not mean that they are right, but it does not mean that we are right either. I think we should have a *very open examination of alternatives* and then get those that fit the case.

Id. at 211 (emphasis supplied).

Darius Gaskins, Director, Bureau of Economics, Federal Trade Commission, stated:

Before we limit ourselves to specific alternatives, we should carefully evaluate these alternatives in operation. One of the best features of this proposed legislation is that it will allow the selection of leasing systems based on practical experience rather than on theoretical studies of prejudgment.

Id. at 663.

of the Act that experimentation with variable net profit share bidding can be rejected.

The Secretaries' Obligations At This Time

Having found in the language and history of the Act a Congressional imperative to promulgate regulations, as a necessary prelude to experimentation, involving non-cash bonus statutory bidding alternatives, including variable net profit share bidding, the critical question is when does such an obligation become due. Appellees argue that even if such an obligation exists, their pace in issuing regulation so far has been reasonable and OCSLA contains no specific deadlines for promulgation of particular regulations.[92] Indeed, appellees advance the circular assertion, noted by the district court, that the regulations have proceeded apace with the Secretary's desire to utilize particular bidding systems.[93]

We conclude that the obligation to promulgate regulations on net profit variable bidding must be fulfilled with the maximum possible speed consistent with procedural and statutory rulemaking requirements. Congress legislated five years as an "experimental" period with alternative bidding systems; that period began September 18, 1978, over two years ago. Even if the Secretary were to propose regula-

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[92] They argue, not unreasonably, that bidding regulations require considerable study, coordination between the Energy and Interior Departments, consultation with the Department of Justice and the Federal Trade Commission, 42 U.S.C. § 7153(b), and in the case of net profit bidding, promulgation of regulations on the way in which profits will be calculated at least ninety days in advance of any sale. Appellees' Brief at 23, 27.

[93] *See* Mem. op., *supra* note 41, at 7.

tions tomorrow, it would still take well into 1981 before they could be finally promulgated, and we are aware that even the proposal of such regulations must be preceeded by weighty deliberations.[94]

By mid-1981—before the next lease sale, now scheduled for May—the midway point in the five year experimental period for alternative bidding systems will have passed. If there is to be meaningful experimentation with variable net profit share bidding, then preparations for promulgation of the necessary regulations must begin immediately. The five year comprehensive leasing plan which went into effect in June, 1980 anticipates thirty six lease sales, almost one-third of which will have been held by the end of 1981. If the variable net profit share bidding option is to have any kind of a fair trial, it would seem that it must be eligible to be utilized within the next year.[95]

The government correctly notes the understandable reluctance of courts to block scheduled lease sales

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[94] Nevertheless, we note that accounting regulations as to what constitutes "net profit" have already been promulgated prior to the issuance of the fixed net profit share regulations authorized by 43 U.S.C. § 1337(a)(1)(D) in 45 Fed. Reg. 36784 (May 30, 1980). When asked whether the same accounting system could be used in connection with a variable net profit system an Interior official indicated that he did not "know any reason why not." Heintz Deposition, *supra* note 44, at 122.

[95] We do not of course make any ruling at this time that affects the Secretary of the Interior's discretion as to when and how much the variable net profit share option must be utilized once it becomes available by the issuance of regulations. We are assuming that regulations for a work commitment bidding system will be achieved in approximately the same time period. *See* note 45 *supra*.

until regulations on all enumerated bidding systems are issued.[96] This reluctance to upset the orderly administration of OCS leasing is most recently reflected in this court's affirmance of the district court's refusal to enjoin the three sales scheduled this fall.[97] Our deference to the discretion of the district court on this aspect of her ruling is grounded in reasonableness of her conclusions regarding irreparable harm and the balance of public equities in the three sales scheduled for the end of 1980. We can, however, reasonably draw the line as to future sales now scheduled for late spring and the summer of 1981. First, it should be feasible for the needed regulations to be in place before the next round of sales. Second, given the relatively distant future date of the 1981 sales, if the schedule needs to be adjusted at all the likely cost and inconvenience should not be as substantial with several months advance notice as would have been the case for the three sales scheduled later

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[96] Brief for Appellees at 33-34. *See also, e.g., Oversight Hearings, supra* note 43, at 1204-6 (letter from Alan A. Parker, Assistant Attorney General, to Rep. Murphy) (April 30, 1980). We agree with the Administration position that Congress did not intend to hold up all OCS leasing and development until all the regulations are promulgated. To do so would be to undervalue the stated statutory objectives of expediting development of the OCS and mitigating this nation's energy problems. However, it is also fair to say that Congress did not endorse a situation where significant non-cash bonus bidding methods it specified would not be tested in a significant manner. Hopefully, scheduled sales for 1981 need not be postponed or at least not delayed for any substantial time before the new regulations can be put in place.

[97] Energy Action Education Foundation v. Andrus, No. 80-2127 (D.C. Cir. Sept. 29, 1980) (partial affirmance of denial of preliminary injunction).

this year. Most important, by mid-1981 failure to issue regulations on variable net profit share bidding and work commitment bidding creates a clear violation of the statutory mandate to experiment with alternatives to front end cash bonus systems and accordingly a clear case of irreparable harm to appellants, and the public and private interests they represent. Thus, the public harm in losing any realistic opportunity to test all the OCSLA leasing methods will outweigh any incidental delay to the transaction of additional lease sales. Further delay in issuing these regulations would mean that experimentation with these options could only occur, if at all, in the last year or two of the five year period, upon whatever tracts remain for exploration. This circumstance would in turn raise a serious question of whether a fair test of variable net profit sharing would be possible, if use of that option were consigned to the last five years for sales of relatively few and possibly less significant tracts. While, as the government maintains, it may be advantageous to garner experience with one new bidding system before moving on to experiment with another [98] we conclude the time has now passed when such advantages can be said to outweigh the disadvantages of failing to allow for any adequate testing or experimentation with the major non-cash bonus of Congressionally authorized bidding systems [sic]. In sum if there is to be significant experimentation with the range of non-cash options specified in the Act, the remaining regulations for those options should be in place in 1981, before the

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[98] *See, e.g.*, Brief for Apellees at 22-4. We are not unaware of the advantages that have been cited for trying new bidding options sequentially. *E.g.*, 44 Fed. Reg. 70390, 70397 (Dec. 6, 1979).

next battery of planned lease sales which begin in May, 1981.[99]

III. Conclusion

For the foregoing reasons, it is our judgment that appellees have an obligation to issue regulations for the remaining two non-cash bonus bidding systems enumerated by Congress in section 8(a)(E) and (G) of the Act and that the obligation to put the regulation-issuing process into operation vests immediately and should be completed in mid-1981. To conclude otherwise would be to find, against the weight of the legislative history, that Congress intended to allow two-thirds of the non-cash bonus variable bidding options it specified to go untried or at best to be placed at an intolerable disadvantage in the five year experimental period despite Congress' explicit commitment to encouraging greater competition and broader participation in OSC development.

Upon remand, then, the district court should insure that, to the maximum extent feasible, regulations for the two non-cash bonus variable bidding options set out in section 8(a)(E) and (G) are promulgated before further lease sales take place in 1981. The court, within its general equitable discretion to order or withhold injunctive relief in the public interest, after hearing from the Secretaries as well as the plaintiffs, should immediately proceed with the task of setting a precise timetable for their issuance that takes account of future scheduled lease

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[99] Should the new alternatives prove not to be promising bidding systems, the Secretary can, of course, subsequently report this determination to Congress as it did in the case of the variable royalty bidding option.

sales as well as any other relevant information proferred by the parties.*

Remanded for proceedings consistent with this opinion

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* The plaintiff-appellants (*see* note 6 *supra*) have standing to sue under section 23(a) of OCSLA, 43 U.S.C. § 1349(a) which authorizes citizen suits to compel compliance with the Act.

Appellees unsuccessfully challenged appellants' standing in 1979 before Judge Robinson (*see* Memorandum of the United States in Opposition to Motion for Preliminary Injunction, J.A. 174, 192-94), before this court on the previous appeal (*see* Energy Action, *supra* note 2, Brief of Appellees at 28) and again this year before Judge Johnson (*see* Energy Action, Civ. No. 1633, Brief for Defendants at 10-15, filed June 23, 1980, Docket No. 50; and Reply Brief for Defendants at 5-9, filed July 29, 1980, Docket No. 64). In contrast; on the present appeal the standing issue was neither briefed nor argued by appellees. When questioned at oral argument on September 26, 1980 about the subject of standing appellees merely indicated that they reserved but had elected not to press at this time their prior challenge to appellants' standing. Then, while the opinion for this expedited decision was at the printer, the court received appellees' motion for leave to file a supplemental brief on the standing issue.

Mindful of the strong policy reasons for restricting consideration of post-submission filings we nevertheless feel that now is a sensible time to dispose of the threshold jurisdictional question reintroduced by appellees' belated assertion of appellants' lack of standing. We find the jurisdictional question to be straightforward and because we do not agree with appellees that appellants are without standing, we do not believe that appellants are prejudiced by not having the opportunity to submit supplemental argument for our consideration.

OSCLA expressly authorizes citizen suits like the present action and identifies who may bring the action:

> [A]ny person having a valid legal interest which is or may be adversely affected may commence a civil action

> on his own behalf to compel compliance with this subchapter against any person, including the United States . . . for any alleged violation of any provision of this subchapter . . . .

43 U.S.C. § 1349(a). We believe appellants have such a valid legal interest both in their capacity as competitors and co-producers on the OCS with the federal government and in their capacity as representatives of consumers of the oil produced on the OCS. Furthermore, they have "a legal interest which is or may be adversely affected" by appellees' complained of conduct.

In essence, appellants claim injury because the failure to use non-cash bonus bidding and the continued predominant use of cash bonus bidding tends to reduce revenues to the federal government, to stifle competition on the OCS, and depresses oil and gas production.

The California government appellants (the State Lands Commission, and the City of Long Beach) are competitors and co-producers on the OCS with the federal government. As lessors and producers of OCS oil they allege concrete and tangible economic injury caused by appellees' failure to increase returns on federal OCS leases. (Complaint ¶ 132, J.A. 1, 71-72) These two appellants posit a present and future disadvantage to their own OCS activity by their inability to compete for bidders who are attracted to the significantly higher returns to private investment available through federal lease. Additionally, appellants maintain that they could obtain a higher return in so-called "drainage" situations if appellees would utilize higher return bidding systems. In drainage situations the state is part owner with the federal government of an OCS site and shares in royalties generated by a lease on the site.

It is even more readily apparent that the consumer appellants have standing to sue for violation of an Act designed to increase competition and to step up utilization of energy resources on the OCS. Consumers are the ultimate beneficiaries of both vigorous competition and greater availability of domestic fuel. Here the consumer appellants contend that appellees' leasing activity causes direct harm to consumers by inflating prices, limiting supplies, and restricting choice on the market. This is the type of economic harm commonly present in consumer based litigation. *See e.g.*, Consumers

Union of the United States, Inc. v. Sawhill, 525 F.2d 1068 (T.E.C.A. 1975); Consumer Federation of America v. FPC, 515 F.2d 347 (D.C. Cir. 1975); Consumers Union of the United States, Inc. v. FPC, 510 F.2d 656 (D.C. Cir. 1974); *see also* Reiter v. Sonotone Corp. —— U.S. ——, 99 S.Ct. 2326, 2331 (1979) (consumers have standing under the Clayton Act); Duke Power Inc. v. Carolina Environmental Study Group, 438 U.S. 59, 72-81 (1978) (individuals and environmental and labor organizations have standing under the Price-Anderson Act). *Cf.* Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977).

In sum, the Act's grant of standing to persons "having a valid legal interest" which "may be adversely affected" includes consumers of oil and gas products who seek redress for the failure of the government to implement the provisions of OCSLA intended by Congress to foster competition and stimulate OCS development.

In the present case we are satisfied that both the California governmental appellants and the consumer appellants have a concrete stake in the outcome of the lawsuit. They have alleged a "distinct and palpable injury," Warth v. Seldin, 422 U.S. 490, 501 (1975), and have asserted a plausible theory for tracing this harm to appellees' challenged conduct. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977). This means that appellants not only satisfy the statutory requirement for standing but, under established law, the constitutional requirements as well. United States v. SCRAP, 412 U.S. 669, 683-690 (1973).

To the extent there is uncertainty about the actual scope of the purported injury, this lack of information may be attributed in part to appellees, whose failure to test non-cash bidding alternatives is the cause of remaining speculation about the benefits of the non-cash bidding alternatives in practice. Moreover, by mandating use of non-cash bidding systems Congress has recognized a causal nexus between government OSC leasing activities and competition and energy production.

Appellees cannot rely on the legislative history of the Act to support a narrow reading of section 23(a). We have already noted that the interests of parties like appellants, and their desire to obtain a greater role in the course of OCS

development, were among the significant forces which lead to the OCSLA revisions of 1978 (*see* p. 9 *supra*). There is no indication that Congress intended to preclude this type of private party from filing citizen suits under section 23(a). On the contrary, the House Report states:

> [Section 23(a)] provides that suits may be brought by "any person having a valid legal interest which is or may be adversely affected." Thus, the scope of persons who can sue are those who can show an actual interest that is being negatively affected, or will be negatively affected at a reasonable time in the future. The interest must be discernible and ascertainable. *Standing to sue includes not only those who have an economic interest,* or who have suffered or will probably suffer a tortuous [sic] injury, *but also those who may have a definable aesthetic or environmental interest.* Specifically, the Committee intends that this includes persons who meet the requirement for standing to sue set out by the Supreme Court in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

(emphasis supplied) H.R. Rep. No. 95-590, *supra* note 16, at 161. Here appellants represent that their economic interests have been and will be harmed. The injury that they specify is at least as discernible and ascertainable as the "aesthetic" and "environmental" interests which could, according to the House Report, give rise to a suit. Subsequent to enactment, the Oversight Committee specifically took note of pending lawsuits by citizens groups involving the OCS including this one. H.R. Rep. No. 96-1214, *supra* note 16, at 59-63; H.R. Rep. No. 95-1835, *supra* Note 13, at 20-22. The Oversight Committee indicated that the concern of section 23 was to provide for orderly resolution of such OCS litigation. *E.g.*, H.R. Rep. No. 96-1214, *supra* note 16, at 18-19. It was apparent that the Committee felt that the way to forestall litigation and to avoid delay in development of the OCS was to implement the new provisions of OCSLA rather than, as appellees would have it, deny private groups access to court by narrowly construing section 23(a). H.R. Rep. No. 95-1835, *supra* note 13, at 20-22.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 80-2127

Civil Action No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Filed Oct. 30, 1980

Before: ROBINSON and WALD, Circuit Judges; and HAROLD GREENE,* United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, and it appearing that this Court, by order filed September 29, 1980, has affirmed the decision of the District Court's refusal

to enjoin three lease sales scheduled for the fall of 1980, it is

ORDERED AND ADJUDGED by this Court, that the order of the District Court on review herein, which refused to enjoin the lease sales scheduled for the fall of 1980, is affirmed, in accordance with this Court's order filed September 29, 1980; respondents are directed to proceed expeditiously to issue the regulations required by the Outer Continental Shelf Lands Act, and this case is remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: October 30, 1980

Opinion for the Court filed by Circuit Judge Wald

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

ENERGY ACTION EDUCATION FOUNDATION, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, SECRETARY OF INTERIOR, ET AL., DEFENDANTS

Filed Sep. 17, 1980

MEMORANDUM OPINION

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, for a Preliminary Injunction. Defendants filed an opposition to the motion. After hearing the arguments of counsel for the parties, the Court took the matter under advisement.

BACKGROUND

In 1953 Congress passed the Outer Continental Shelf Lands Act ("OCS Act") to provide for the leasing of off-shore lands by the federal government to private companies for exploration and development of oil and natural gas resources. This Act gave the Secretary of Interior the authority and discretion to administer leases on federal off-shore lands through the use of two different methods of competitive bidding: (1) a cash bonus bid basis with a royalty fixed by the Secretary of not less than 12½

per centum of the gross revenue of the lease and (2) a royalty rate bid with a fixed cash bonus payment.*

Congress, recognizing the need to reform the OCS Act to avoid excessive dependence on foreign nations for oil and gas supplies, to expand production on the outer continental shelf, to assure a fair return to the public, and to foster competition for the leases, amended the OCS Act in 1978.** The 1978 Amendments were designed to expedite oil and gas exploration and production for domestic use, to insure the public a fair and equitable return on these resources, to preserve and maintain competition, and to provide for a balance of development with protection of the environment.

One of the primary purposes of the new legislation is to achieve a superior bidding system through experimentation. The OCS Act, as amended in 1978, provides the Secretary of Interior with authority to grant to the highest responsible qualified bidder or bidders by competitive bidding, oil and gas leases on submerged lands of the outer continental shelf. The statute enumerates the bases on which the bidding, which shall be by sealed bid and at the discretion of the Secretary, shall occur. The bidding systems are:

1. Cash bonus bid with a fixed royalty at not less than 12½ per centum;

2. Variable royalty bid, with either a fixed work commitment or a fixed cash bonus as determined by the Secretary, or both;

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* 43 U.S.C. § 1337(a) (1976).

** 43 U.S.C.A. § 1331 *et seq.* (West Supp. 1979).

3. Cash bonus bid or work commitment bid with a fixed cash bonus and a diminishing or sliding scale royalty of not less than 12½ per centum;

4. Cash bonus bid with a fixed share of net profits of not less than 30 per centum;

5. Fixed cash bonus with a variable net profit share;

6. Cash bonus bid with a fixed royalty at not less than 12½ per centum and a fixed per centum share of net profit of not less than 30 per centum;

7. Work commitment bid with a fixed cash bonus and a fixed royalty.

43 U.S.C.A. § 1337(a)(1)(A)-(G) (West Supp. 1979). Additionally, the statute provides for bidding on the basis of any modification of the aforementioned bidding systems or any other systems of bid variables, the terms and conditions which the Secretary determines to be useful to accomplish the purposes and policies of the statute. 43 U.S.C.A. § 1337(a)(1)(H) (West Supp. 1979).

From 1953 until the 1978 Amendments, almost all lease sales were conducted pursuant to the cash bonus-fixed royalty system. However, the royalty bid-fixed cash bonus bidding system was employed in lease sales in 1977 and the cash bonus-sliding scale royalty system was used in two lease sales in early 1978. Of the eight lease sales that have occurred since the passage of the 1978 Amendments, approximately one-half of the tracts have been offered pursuant to the standard cash bonus-fixed royalty system, and the other half by the cash bonus-sliding scale royalty system.

The OCS Act, as amended, further requires the Secretary of Interior to prepare and to maintain a comprehensive oil and gas leasing program to implement the policies of the Act. 43 U.S.C.A. § 1344(a) (West Supp. 1979). The leasing program is to consist of a schedule of proposed lease sales which the Secretary determines will best meet national energy needs for the five-year period following its approval or reapproval, and is to reflect consideration of environmental, social, and econmic concerns as well as the assurance of fair market value to the government on leased land. Congress also imposed the requirement that the Secretary apply alternative bidding systems, other than the cash bonus-fixed royalty, to not less than 20% and not more than 60% of the total area offered for leasing each year during the five-year period beginning September 1978. 43 U.S.C.A. § 1337(a)(5)(B) (West Supp. 1979).

The five-year leasing program contemplated by the statute was approved by the Secretary of Interior in June 1980. The lease sale scheduled for September 1980 is the first sale to take place under the program, and will employ the first four enumerated bidding systems.

The plaintiffs in this case, consisting of nine consumer organizations, three private citizen-taxpayers, and two California government entities, filed this action in this court on June 22, 1979. The complaint names as defendants the United States, the Secretary of Interior, and the Secretary of Energy. Plaintiffs seek declaratory and injunctive relief to prohibit the defendants from conducting any future leasing pursuant to the OCS Act, until the Secretary of Energy has promulgated regulations governing use of all alternative bidding systems authorized by the Act, in-

cluding systems allowing for the sharing of net profits. The plaintiffs further seek declaratory and injunctive relief to prohibit the further use of the cash bonus-fixed royalty bidding method, alleging that the use of this method does not comply with the intent of the OCS Act. The plaintiffs also seek an order by the Court directing defendants to review all existing leases and to take corrective action if such review reveals that the leases will not yield a fair return to the government.

On June 25, 1979, plaintiffs filed a motion for preliminary injunction to enjoin Lease Sale No. 48, which was to take place on June 29, 1979. Plaintiffs specifically sought to enjoin further lease sales in the absence of regulations for all the bidding methods contained in the OCS Act. Judge Aubrey E. Robinson denied the motion for preliminary injunction, ruling that plaintiffs had not shown a likelihood of success on the merits. The court found that the partial use of the cash bonus-fixed royalty system complied with the statutory requirement that a mix of that method along with other methods be used. Its use did not violate the purpose of the OCS Act. The court also found that defendants had not acted in an arbitrary or capricious fashion by failing to promulgate regulations for all the alternative bidding systems, in light of the complexity and sensitivity involved in the promulgation of the regulations. The Congressional oversight provision which is incorporated into the OCS Act led the court to find that there existed adequate safeguards against the improper use of bidding systems.

On two occasions the plaintiffs sought by motion to modify Judge Robinson's order: first, to restrain defendants from awarding any leases under Sale 48

on a cash bonus-fixed royalty basis, and second, to restrain the acceptance of bids and the award of leases under Sale 48 because the bidding results demonstrated that acceptance would be contrary to the requirements of the OCS Act. The first motion was rendered moot and the second motion was denied.

The plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit from the denials by Judge Robinson of their motion for preliminary injunction ad motion for modification. Since Judge Robinson had based his decisions in part, upon his reading of the OCS Act amendments, the U.S. Court of Appeals undertook an examination of the meaning of the statute. In a unanimous opinion by the late Judge Leventhal, the the Court of Appeals affirmed the orders of Judge Robinson.*

Judge Leventhal found that the real question before the Court was "whether the continued partial use of cash bonus-fixed royalty bidding—as planned for the near future by the Secretary—violates the statutory scheme." The Court upon analysis of the statute along with relative parts of the legislative history, concluded that it did not. The Court further discussed whether at that point in time the failure of defendants to promulgate all regulations for alternative bidding systems violated the OCS Act amendments. The Court stated that on the record before it, it could not say that the government's actions to date had run afoul of the legislative scheme. The Court specifically left open the question of whether at some point in time the Secretary's delay in issuing other regulations and in failing to experiment more widely among alternative bidding systems

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* *Energy Action Educational Foundation* v. *Andrus*, No. 79-1768 (D.C. Cir. Dec. 20, 1979).

may constitute a violation of the OCS Act amendments. This is the issue before the Court at this juncture.

DISCUSSION

I. *Plaintiffs' Contentions*

Plaintiffs, in the instant motion, seek partial summary judgment or a preliminary injunction on the grounds that the failure of defendants to develop and implement regulations for all seven alternative bidding systems some two years after the enactment of the 1978 Amendments is violative of the OCS Act. They contend that not one single bidding system will be utilized in the three lease sales scheduled for 1980 that was not used prior to the 1978 Amendments and that every tract leased or proposed for leasing since September 1978 has followed the cash bonus bidding system. It is urged that defendants' failure to promptly promulgate regulations for all seven enumerated systems is not only an abuse of discretion but also a violation of the OCS Act in that the experimentation mandated by Congress is being frustrated.

Plaintiffs argue that the most important objective underlying the whole statute is the desire of Congress to try non-cash bonus bidding systems. They maintain, by reference to the statute and the legislative history, that Congress mandated the Secretary of Interior to use non-cash bonus bidding systems rather than cash bonus systems. It is only through non-cash bonus bidding, plaintiffs contend, that the public will achieve a principal goal of the 1978 Amendments; i.e., fair market value or a fair return on the leases.

Plaintiffs further argue that they, as well as Congress, wish to experiment with "profit share bidding"

with a fixed cash bonus, a successful bidding system used by the State of California. 43 U.S.C.A. § 1337 (a)(1)(E) (West Supp. 1979). Plaintiffs suggest that a review of the eight sales conducted since September 1978 makes it amply clear that the Department of Energy has no intention of promulgating regulations for variable profit share bidding. Thus, they urge that the lease sales scheduled for September 1980 should be enjoined since defendants persist in utilizing bidding systems that neither assure a fair return nor foster competition.

II. *Defendants' Contentions*

Defendants, in opposition to the motion, argue that the Department of Energy has issued regulations for four bidding systems since September 1978. These four systems, to be utilized in the September 1980 lease sales, are: (1) variable royalty bidding-fixed cash bonus; (2) cash bonus-fixed royalty; (3) cash bonus-sliding scale royalty; and (4) cash bonus-fixing net profit. Although defendants maintain that the OCS Act does not require the promulgation of regulations for every enumerated bidding system, defendants state that the Department of Energy is in the process of preparing regulations for the variable net profit share bidding system and the work commitment bid system options.

Defendants contend that even if it is found that regulations for each enumerated system are mandated, the pivotal question is whether the pace of issuing the regulations is in accordance with law. They maintain that the issuance of regulations complies with the statutory mandate and, more importantly, the OCS Act contains no deadlines for promulgation. Defendants also assert that the development of regu-

lations have coincided well with their utilization. Defendants also contend that their conduct is in conformance with the statutory mandate as Congress did not intend to discourage bidding systems which contain cash bonus as a bid component.

III: *The Motion for Partial Summary Judgment*

A motion for summary judgment places the burden on the moving party to establish that there is no genuine issue of material fact and that judgment should be granted as a matter of law. Plaintiffs contend that this Court should grant them partial summary judgment, finding that there is no dispute as to any material fact and that as a matter of law, the defendants' failure to develop regulations for all seven alternative bidding systems is a violation of the OCS Act.

The plaintiffs base their request for partial summary judgment on those portions of the OCS Act and its legislative history which authorize and encourage the promulgation of regulations for and the implementation of alternative bidding systems. Plaintiffs interpret the language and history of the OCS Act to mean that Congress intended the Secretary of Interior to use bidding systems other than cash bonus systems. In contending that Congress specifically sought the use of non-cash bonus systems to experiment and to determine which systems are best suited for lease sales, plaintiffs argue that defendants' failure to develop regulations for non-cash bonus systems demonstrates a refusal to experiment with statutorily required alternative systems. All parties agree that no one bidding system can be used prior to the promulgation of regulations for that system. Thus, plaintiffs assert defendants' failure to issue the necessary

regulations precludes the use of the alternative bidding systems contemplated by Congress, thereby frustrating Congressional intent and violating the statute. Plaintiffs further read the legislative history to mean that regulation for all bidding systems must be promulgated before lease sales can proceed.

Plaintiffs cite the opinion of the Court of Appeals which states, "at some point in time the Secretary's delay in issuing profit-sharing regulations and in failing to experiment among alternative bidding systems more widely may constitute a violation of the OCS Act amendments," Slip op. at 21, to argue that this is the point in time at which the Secretary is in violation of the Act.

Defendants contend that there is no timetable for promulgation of the regulations, and even if there is a timetable, the Secretary's present rate of promulgation is at a pace in accordance with the law. Defendants dispute plaintiffs' interpretation of the statute and legislative history arguing that no where is it mandated that the Secretary promulgate regulations for or use every bidding system contained in the Act. Furthermore, defendants argue that the Secretary has been granted by Congress wide discretion in the use of the bidding systems. Defendants contend and have produced evidence to support their position, that they have experimented with alternative bidding systems, through the past use of the cash bonus-sliding scale royalty system, and will experiment with the cash bonus-fixed net profit share system in the September 1980 sale. Therefore, defendants deny that the absence of regulations for all bidding systems authorized by the OCS Act violates the statute and precludes the continuation of lease sales.

It is the opinion of this Court that there does exist a genuine issue as to whether the statute requires the Secretary to fully promulgate regulations for all bidding systems before leasing activity on the outer continental shelf can take place. Certainly, this is a material fact in dispute which precludes the grant of plaintiffs' motion for partial summary judgment. Accordingly, the motion for partial summary judgment will be denied.

IV. *The Motion for Preliminary Injunction*

Plaintiffs seek, in the alternative, a preliminary injunction enjoining the September 1980 lease sales. Preliminary injunctive relief is an extraordinary equitable remedy. The law is well settled that the moving party has the burden of demonstrating that (1) he will suffer immediate irreparable injury if the relief is not granted; (2) he has a strong likelihood of succeeding on the merits; (3) a balancing of the equities and maintenance of the status quo favor relief and (4) the public interest will be favored by the grant of such relief. *Virginia Petroleum Jobbers* v. *Federal Power Commission*, 110 U.S. App. D.C. 339, 259 F.2d 921 (D.C. Cir. 1958). The elements will be discussed seriatim.

Irreparable Injury

The plaintiffs contend that they will be irreparably harmed if the Court fails to enjoin the defendants from proceeding with the lease sales scheduled for September 1980 absent the full promulgation of regulations for and implementation of all the alternative bidding systems. At the heart of this injury, plaintiffs allege, is the cash bonus-fixed royalty system which, as employed by defendants in the past,

will cause damage to plaintiffs for it fails to promote proper competition and expeditious development of off-shore energy reserves. To support their arguments, plaintiffs refer to reports submitted in relation to past lease sales. These reports discuss how the cash bonus-fixed royalty bidding system operates and conclude that the system depresses production and competition as well as reduces fair return to the federal treasury. The plaintiffs also rely on reports and statistical data to support their contention that use of the cash bonus-fixed royalty system is designed to discourage the small bidder thereby decreasing competition and ultimately causing injury. Plaintiffs principally rely on the testimony of their expert, George Donkin, whose affidavit states that every sale in which the cash bonus system with a fixed-royalty at one-sixth (1/6) was used, produced a diminishing return to the federal government.

Plaintiffs expound on the negative aspects of the cash bonus-fixed royalty system but fail to demonstrate exactly how they are injured by the failure of defendants to promulgate *all* the regulations. Plaintiffs focus only on how the cash bonus-fixed royalty system is the least favorable system to the public interest and why regulations for and implementation of the variable profit share system will be most favorable.

Injunctions should not issue unless the threat of injury is imminent and well-founded and the injury itself would be incapable of being redressed after a final hearing on the merits. The Court finds that plaintiffs have failed to demonstrate the requisite irreparable injury to them in relation to the scheduled September 1980 sale. The cash bonus system with fixed royalty is not the exclusive method by which

leases are being offered for sale. Moreover, the use of this system is consistent with the intent of Congress to experiment in order to obtain valid data for comparison with the performance of other systems.

Likelihood of Success

Upon consideration of a motion for preliminary injunction, the Court need only consider the likelihood of success on the merits, for adjudication of the merits must await a full hearing. In the instant motion, plaintiffs maintain that the ultimate question for resolution is whether the Department of Interior can continue in the third year after the new statute with exclusive use of cash bonus bidding and even refuse to promulgate the profit share bidding regulations which Congress most wanted to see. Defendants state the issue is whether the OCS Act requires the promulgation of regulations for each of the enumerated bidding systems and submit that even if this is true, the main inquiry is whether the pace of issuing regulations is in accordance with the law.

Plaintiffs rely on the legislative history and the statute to support their contentions. Their arguments, however, merely reflect the intent of Congress to have the Secretary of Interior retreat from the sole and exclusive use of the cash bonus-fixed royalty bidding system and to develop and use other systems which promise to meet the goals and policies of the 1978 Amendments. Plaintiffs urge the Court to find that Congress mandated the use of only non-cash bonus bidding systems in lease sales in order to achieve fair market value. Plaintiffs also appear to suggest that the amendments require bidding systems "other than cash bonus" rather than "in addition to cash bonus."

The OCS Act on its face authorizes four cash bonus bidding systems, including the traditional cash bonus-fixed royalty. There is evidence in the record tending to establish that leases offered under this traditional system may not produce a fair return and indeed may be anti-competitive; however, this evidence was within the knowledge of Congress before its enactment of the statute and the system was nonetheless expressly retained, albeit with limitations, for use during the five-year plan.

Plaintiffs do appear to categorize, as defendants contend, all cash bonus bidding systems under one rubric: cash bonus-fixed royalty. Enumerated in the OCS Act, however, are cash bonus systems with differing royalties which may result in a fair return as previous experience with the sliding scale royalty seems to indicate. It also appears clear from the OCS Act and the legislative history that the Secretary of Interior must report to Congress the *use* and *non-use* of the various bidding options. This may well indicate that even if regulations had been promulgated for all enumerated systems, it cannot be said that the Secretary is abusing his discretion solely because the variable net profit share bidding system is not being utilized in the September 1980 sale. Certainly, the evidence of record does not support such a finding.

Further, the Court is not persuaded that the statute and legislative history clearly prohibit leasing until all the enumerated bidding regulations are promulgated. On the contrary, the statute provides in pertinent part:

> After the leasing program has been approved by the Secretary, or after eighteen months following September 18, 1978, whichever first occurs, no lease shall be issued unless it is for an area

> included in the approved leasing program and unless it contains provisions consistent with the approved leasing program, except *that leasing shall be permitted to continue until such program is approved and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter.* (Emphasis added).

43 U.S.C.A. § 1344(d)(3) (West Supp. 1979). However, the Court is persuaded that under certain circumstances, the leasing program may be subject to further judicial scrutiny notwithstanding the above.

The sale which plaintiffs seek to enjoin constitutes the first sale scheduled under the five-year leasing program. The September sale utilizes over 50% of the enumerated bidding systems and, in addition, does not appear to violate the statutory limitations on the use of cash bonus-fixed royalty bidding. After full consideration, the Court finds and concludes that plaintiffs have failed to clearly demonstrate a strong likelihood of success on the merits.

Balancing the Equities
The Public Interest

Plaintiffs contend that the public interest would be best served by a delay in the lease sales in that injury to the public through reduced revenues and competition would be alleviated. Plaintiffs view any delay resulting from an injunction as necessarily being of short duration as defendants, in their view, have the necessary analyses to promulgate regulations for all systems but are purposefully "stonewalling" apparently to protect certain interests. Defendants, on the other hand, contend that the grant-

ing of a preliminary injunction would unduly delay lease sales and ultimately frustrate the overriding thrust of the entire OCS Act, which is to expedite development of the outer continental shelf. Defendants deny that the delay would be short and maintain that it would work to the detriment of the public interest. First, because of the complexities involved in promulgating regulations for the remaining bidding systems, the delay could be a year or more in length. Secondly, this delay would force the Secretary to compress the enjoined sales into a later period of the five-year plan. Thus defendants argue there is a serious question whether bidders would have the resources to participate in sales appearing in such rapid succession, which in turn could result in declining production and an increased dependence on foreign oil and gas.

In striking a balance between these divergent views, the Court finds and concludes that defendants have not clearly demonstrated that more harm with result to them from a denial of the injunction than will result to defendants from its grant. Further, the Court is convinced that plaintiffs have not clearly demonstrated that the public interest will by served by the issuance of an injunction.

CONCLUSION

Upon consideration of the pleadings, the motion for partial summary judgment or, in the alternative, for preliminary injunction, the opposition thereto, the memoranda of points and authorities submitted by the parties, the argument of counsel, the record, and the reasons stated herein, the Court finds and concludes that the motion of plaintffs should be denied.

WHEREFORE, it is this 17th day of September, 1980,

ORDERED that the motion of plaintiffs for partial summary judgment or, in the alternative, for a preliminary injunction be and hereby is denied.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL. PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of Interior, ET AL. DEFENDANTS

[Filed Sep. 17, 1980]

ORDER

Upon consideration of the Defendants' Motion for Summary Judgment, the plaintiffs' opposition to the motion, the arguments of counsel for the parties and the entire record, and the Court being of the opinion that there exists genuine issue as to material facts, which precludes the Court from granting summary judgment, it is therefore this 17th day of September 1980,

ORDERED, that Defendants' Motion for Summary Judgment be, and hereby is, denied.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1768

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

No. 79-1787

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 79-1633)

Argued October 12, 1979

Decided December 20, 1979

Before: LEVENTHAL* and WALD, *Circuit Judges* and NICHOLS**, *Judge*, United States Court of Claims

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

Concurring opinion filed by *Circuit Judge* WALD.

LEVENTHAL, *Circuit Judge*: In this case we are asked to decide whether the bidding systems currently employed by the Secretary of the Interior in leasing government offshore properties for oil and natural gas development comply with the Outer Continental Shelf Lands Act,[1] as substantially amended in 1978. Appellants challenge two district court orders denying their request to enjoin the Secretary from conducting further lease sales until alternative bidding systems are used. Although we cannot say whether the Secretary is implementing the amendments as expeditiously as possible, we are convinced that he has not contravened the letter of the law. Accordingly, we affirm both orders of the district court.

I. BACKGROUND

Since the enactment in 1953 of the Outer Continental Shelf Lands Act (OCS Act), the federal government has been actively engaged in leasing OCS lands[2] to private companies for the exploration and

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* Judge Leventhal authored this opinion but died before it was released.

** Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] 43 U.S.C.A. § 1331 *et seq.* (West Supp. 1979).

[2] The term "Outer Continental Shelf" has been defined as all submerged lands lying seaward and outside State waters (three miles), "and of which the subsoil and seabed apper-

development of oil and natural gas deposits. The original act delegated broad authority to the Secretary of Interior for implementing and administering the legislation, but it was uncharacteristically specific with respect to lease bidding procedures. The Secretary was directed to conduct competitive bidding by sealed bids under one of two alternative formulas. He could solicit bids either (a) on the basis of a cash bonus bid with a fixed royalty (fixed at no less than 12½% of the gross revenue of the lease), or (b) by a royalty rate bid with a fixed cash bonus payment.[3] As between these two methods, the Secretary's discretion was not limited. Until recently, virtualy all leases made under the OCS Act were issued through the cash bonus-fixed royalty alternative, with the royalty set in advance of bidding at 16⅔% (one-sixth) of the gross value of the production.[4] Under that procedure, a lease would be awarded to the responsible qualified bidder with the highest cash bid on a given tract, assuming the bid was deemed to provide an adequate return to the government on the tract.

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tain to the United States and are subpject to its jurisdiction and control." 43 U.S.C. § 1331(a). With few exceptions, most OCS leasing to date has involved tracts in the Gulf of Mexico. Only recently has the government opened to bidding the "frontier areas" in the Pacific and Atlantic Oceans. *See generally* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 65-74 (1977).

[3] 43 U.S.C. § 1337(a) (1976).

[4] Between the original passage of the OCS Act and the initiation of this action, the Secretary had conducted 47 oil and gas lease sales in which 3,450 leases had been awarded. *See* Joint Appendix (J.A.) at 179.

Several critical events during the mid-1970s necessitated a massive revision of the OCS Act.[5] Most prominently, the nation's increasing dependence on foreign sources of energy, laid bare by the oil embargo of 1973, caused many in government to turn to the Outer Continental Shelf as a potential, though unproven, supply of American short-range energy needs. At the same time, the prospects of greater offshore oil and gas production—and the increased consciousness of environmental protection concerns—spurred local governments and environmental groups to seek a greater role in regulating future OCS ventures.

Other developments more directly pointed to inadequacies in the bidding system used in leasing OCS lands. The dramatic increases in the price of oil and natural gas made it evident that the cash bonus-fixed royalty system of bidding led to a situation wherein the total royalties paid to the government were declining as a percentage of gross proceeds on wells. Several reports issued by the Comptroller General beginning in 1975 expressed the strong reservation that the cash bonus-fixed royalty system could not assure the government a fair return on its leases.[6] In addition, those reports indicated that the cash bonus system had anticompetitive effects, leaving smaller operations, with fewer financial resources, relatively unable to compete, given the high front-end cash bonus payments and the many uncertainties associated with exploring untested areas. The

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[5] *See generally* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. (1977).

[6] *See id.* at 110-11; S. Rep. No. 95-284, 95th Cong., 1st Sess. 60-68 (1977); J.A. 47-50.

Interior Department's own experimentation on two occasions with the alternative system, royalty bidding, seemed to confirm that cash bonus-fixed royalty bidding did not generate sufficient competition nor produce adequate returns to the government.[7]

Congress responded to the divergent stimuli for reform with the comprehensive Outer Continental Shelf Lands Act Amendments of 1978. These amendments reflect the often competing concerns for environmental protection, cooperation among all interested parties, and the acceleration of OCS oil and gas development. Most provisions of the amendments have no bearing on the case before us; a few, however, are central to this appeal. Congress expressly retained the two bidding systems previously authorized, but it added five other specific alternatives as well as any non-enumerated system the Secretary determines to be useful to accomplish the purposes and policies of the amendments.[8] The Secretary of Interior retains

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[7] *See* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 138-39 (1977).

In testimony before Congress, then-Secretary of the Interior Rogers Morton conceded that fair market value might not be obtained by cash bonus leases in light of escalating prices:

> [O]n the Outer Continental Shelf, we have been collecting 16-2/3 percent of all of the production. You might say, and I think very well say, this is not a high enough percent because we really don't get true value, if, at the time the bonus is bid, oil is selling at $5 and then it goes up to $10. The 16-2/3 percent royalty is not high enough. We are examining that.

Hearings on S. Res. 45 and S. Res. 222 Before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Commerce, 94th Cong., 1st Sess. 68 (1975).

[8] 43 U.S.C.A. § 1337(a)(1) (West Supp. 1979).

his discretion in selecting among alternative bidding systems, though he is restrained to some extent by percentage limits on the use of certain systems.[9] In addition, although the Interior Secretary is to conduct all lease sales under the Act, it is the Secretary of the Department of Energy who, in consultation with the Interior Secretary, must promulgate regulations governing the use of each particular new bidding system.[10] The Secretary of Energy annually, and the Interior Secretary with each lease sale, must report to Congress concerning the use and nonuse of the various OCS bidding options.[11] Finally, a new section was added to the OCS Act requiring the Secretary of Interior to prepare and maintain a comprehensive oil and gas leasing program to implement the different policies of the Act.[12] That program must adhere to several principles spelled out in the statute, including a balanced consideration of economic, social and environmental concerns and the as-

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[9] 43 U.S.C.A. §§ 1337(a)(1), (a)(5)(B) (West Supp. 1979). Section 8(a)(5)(B) of the OCS Act requires the Secretary to use alternatives other than cash bonus-fixed royalty bidding on 20-60% of all acreage offered for leasing each year and for the next five years.

[10] Under Section 302(b)(2) of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. § 7101 *et seq.*, the responsibility of the Secretary of the Interior to promulgate regulations implementing OCS alternative bidding systems was transferred to the Secretary of Energy. 42 U.S.C.A. § 7152 (b)(2) (West Supp. 1979). *See* H.R. Rep. No. 95-1474, 95th Cong., 2nd Sess. 77-78, 90 (1978) (conference report).

[11] *See* 43 U.S.C.A. §§ 1337(a)(8)(9), 1343(2) (West Supp. 1979).

[12] *Id.* at § 1344.

surance of a fair market value on leased land to the government.[13]

This litigation grows out of the Interior Secretary's continued partial use of the cash bonus-fixed royalty bidding system. Between the effective date of the OCS Act amendment[14] and the date on which this lawsuit was filed, three OCS lease sales were conducted. In each instance the Secretary chose cash bonus-fixed royalty bidding for part of the tracts to be leased, while using another bidding system—a cash bonus system with a fixed non-linear (semi-logarithmic) sliding scale royalty[15]—for the other tracts. Four other lease sales, scheduled to take place between June and November of 1979, planned to utilize the same mix of alternative bidding systems. Bids on the first of these, Lease Sale 48, were scheduled for opening on Friday, June 29, 1979.

Appellants, consisting of nine consumer organizations, three private citizen-taxpayers, and two California governmental entities,[16] commenced this liti-

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[13] *Id.* at § 1344(a).

[14] The amendments became effective on September 18, 1978.

[15] Under this system the lessee pays a percentage royalty on a schedule fixed in advance by the Secretary in which the payment percentage increases as the scale of production increases.

[16] The fourteen appellants are: Energy Action Educational Foundation; Consumer Federation of America; Consumer Energy Council of America; Michigan Citizens Lobby; Arkansas Consumer Research, Inc.; Service Employees International Union; International Association of Machinists; Citizen/Labor Energy Coalition; Texas Consumer Association; M. James Doling; Paul Casagrande; Kathleen F. O'Reilly; California State Lands Commission; and the City of Long Beach, California.

gation in the District Court for the District of Columbia on June 22, 1979. Naming the United States, the Secretary of Interior, and the Secretary of Energy as defendants, appellants sought declaratory and injunctive relief leading to the suspension of all OCS leasing "until the Secretary of Energy has promulgated regulations governing the use of all alternative bidding systems authorized in [the OCS Act], as amended, including systems allowing for the sharing of net profits." [17] Appellants also asked for an injunction against further leasing under the cash bonus-fixed (16⅔%) royalty as well as a full investigation of existing leases and corrective action should it be demonstrated that they will not yield a fair return to the government.

The essence of appellant's complaint is that cash bonus-fixed royalty bidding, particularly with the royalty fixed at 16⅔%, cannot yield fair market value nor generate adequate competition as mandated by the amended OCS Act. Only through the issuance and use of regulations authorizing alternative systems, most notably the profit-sharing options, can the government achieve the statutory objectives. However, according to appellants, issuance of those regulations has been unduly delayed by a "jurisdictional squabble" between the Departments of Energy and the Interior.[18]

On June 25, 1979, four days prior to the scheduled opening of bids on Lease Sale 48, appellants filed a motion for a preliminary injunction seeking to prevent further lease sales "in the absence of regulations establishing the full range of bid systems man-

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[17] J.A. 76.

[18] Pet. Br. at 3, 13-14.

dated by the Outer Continental Shelf Lands Act." [19] A hearing on the motion was held on June 27. Later that day, District Judge Aubrey E. Robinson, Jr., denied appellant's preliminary injunction motion. In its Memorandum and Order, the district court ruled that plaintiffs had not shown a likelihood of prevailing on the merits.[20] The stautory scheme laid out in the 1978 amendments was not violated in lease sales subsequent to their enactment. To the contrary, the court found that the Secretary's partial use of the cash bonus-fixed royalty system complied full with the statutory requirement that a mix of that system with others be used and could not be found to violate the purposes of the OCS Act. The court further determined that the defendants had not acted arbitrarily or capriciously in failing to promulgate regulations as yet regarding some of the alternative bidding systems "in light of the complexity and sensitivity involved in preparation of such regulations." [21] Finally, the court found adequate safeguards against improper use of bidding options in the Congressional oversight scheme incorporated in the Act.

Appellants did not appeal this order but on June 28 moved for modification of that order so as to restrain the defendants from awarding cash bonus-fixed royalty leases under Sale 48.[22] The next day, as sched-

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[19] J.A. 129.

[20] J.A. 293.

[21] J.A. 294.

[22] J.A. 296. This request was rendered moot by appellees' representation that by statute awards would be delayed at least 30 days in order to afford the Attorney General an opportunity to conduct a review of the sale's competitive effects. J.A. 306 n.1.

uled, the Secretary opened Sale 48 bids. Shortly thereafter, the appellants again filed a motion seeking modification of the June 27 order, maintaining that the results of bidding on Lease Sale 48 indicated that acceptance of the bids would contravene the fair market value and competition requirements of the OCS Act. In a brief order, the district court denied this motion, reasoning that appellants had "still failed to show that utilization of the cash bonus-fixed bidding system with a 16⅔% fixed royalty violates the Outer Continental Shelf Lands Act." [23]

This appeal, expedited as required by statute,[24] ensued. Both the district court and this court denied applications for a stay pending appeal of the Secretary's award of leases under Sale 48.

II. ANALYSIS

To some extent the procedural posture of this case narrows our scope of review. This court has often observed that the grant or denial of a preliminary injunction motion normally lies within the discretion of the trial judge. An appellate court's review is limited to determining whether the district judge abused his discretion, "or rested his analysis upon an erroneous premise." [25] Nevertheless, when the district court's action rests on an interpretation of

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[23] J.A. 549.

[24] 43 U.S.C.A. § 1349(d) (West Supp. 1979).

[25] A Quaker Action Group v. Hickel, 137 U.S.App.D.C. 176, 180, 421 F.2d 1111, 1115 (1969). *See also* National Ass'n of Greeting Card Publishers v. U.S. Postal Service, 186 U.S.App.D.C. 331, 363, 569 F.2d 570, 602 (1976); Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 10, 458 F.2d 827, 832 (1972).

the applicable law, that interpretation is reviewable fully and *de novo* in the appellate court.[26] Inasmuch as the district judge drew support from his reading of the OCS Act amendments, we are compelled to examine the meaning of the statute.

It cannot be gainsaid that Congress was deeply concerned with the assurance of fair market value and adequate competition in OCS leasing. Both the legislative history[27] and the 1978 amendments themselves[28] address those interests. Furthermore, it may well be that cash bonus-fixing royalty bidding is less likely to maximize those aims and that, conversely, profit-sharing or other alternative bidding systems might be more successful in that regard.[29] In addition, we can assume, *arguendo*, the accuracy of appellants' assertion that the emergence of profit-shar-

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[26] Delaware & Hudson Ry. Co. v. United Transportation Union, 146 U.S.App.D.C. 142, 159, 450 F.2d 603, 620 (1971).

[27] *See, e.g.*, H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 47, 54 (1977); S. Rep. No. 95-284, 95th Cong., 1st Sess 43, 46, 47 (1977); J.A. 51-56.

[28] *See, e.g.*, 43 U.S.C.A. §§ 1332(3), 1337(c), 1343, 1344(a)(4), (d), 1802(2) (West Supp. 1979).

[29] Appellants amassed substantial evidence to demonstrate the superiority of a profit-sharing bidding system over the cash bonus-fixed royalty option. They pointed to the successful experience with profit-sharing of other oil and natural gas lessors, such as the State of California and several foreign countries. J.A. 39-44. They also found support in the government's own experiences with alternative systems and its many concessions that a profit-sharing system could best assure the receipt of fair market value and competition for tracts. J.A. 40-41, 46, 52-53, 68-69. This evidence did not escape the legislators' purview. *See* S. Rep. No. 95-284, 95th Cong., 1st Sess. 73 (1977).

ing regulations has been hampered by inter-agency disputes.[30] Nonetheless, bearing in mind the competing policies underlying the amendments and the explicit language of the revisions, the real question before us is whether the continued partial use of cash bonus-fixed royalty bidding—as planned for the near future by the Secretary—violates the statutory scheme. We hold that it does not.

Congress enacted the provisions dealing with lease bidding after exhaustively reviewing the Secretary's 25-year record of administering the OCS Act. It cannot be doubted that Congress had the opportunity to discard the cash bonus-fixed royalty system or to restrain the Secretary's discretion in according it substantial use. In essence, it chose to do neither.

Congress declined to omit cash bonus-fixed royalty bidding when it rewrote § 8(a) of the OCS Act. That section continues to provide that lease bidding, "at the *discretion* of the Secretary," may be on the basis of cash bonus-fixed royalty bidding or fixed bonus-variable royalty bidding.[31] Other bidding options were added to the list, though authorizing regulations for those systems must be promulgated in advance of their use.

But Congress did not stop there. The Secretary's discretion in choosing among alternative bidding systems was limited in one crucial respect. Elsewhere in that section, at § 8(a)(5)(B), Congress mandated

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[30] The government does not deny the basic thrust of this assertion which had its root in a June 4, 1979 report of the General Accounting Office entitled, "Federal Leasing Policy—Is the Split Responsibility Working?" The full report appears at J.A. 154-72.

[31] 43 U.S.C.A. § 1337(a)(1) (West Supp. 1979) (emphasis added).

that cash bonus-fixed royalty bidding be utilized in a large percentage of leases. According to the express terms of the provision:

> The bidding systems [other than cash bonus-fixed royalty bidding] shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on [the date of the enactment of this section].[32]

Stated differently, Congress affirmatively intended that subsequent to passage of the amendments, cash bonus-fixed royalty bidding was to be used in at least 40% of all leases each year for five years. The only limitation put on use of this option was that it should not be used for more than 80% of the leases.

The legislative reports accompanying the amendments also reveal Congress's intent to preserve the cash bonus-fixed royalty bidding option. Congress sought experimentation among bidding systems, usually through direct comparisons between cash bonus-fixed royalty bidding and other options, in order to obtain reliable information as to the relative advantages and disadvantages of the enumerated systems. It was hoped that this testing would ultimately enable the Secretary to utilize the system or mix of options which emerged as superior. The House conference report notes:

> Although there is no requirement for random selection, the Secretary, in setting forth systems for use on tracts, shall seek to secure a fair selection of different methods on different tracts. The purpose of such a selection is to assure that

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[32] 43 U.S.C.A. § 1337(a)(4)(B) (West Supp. 1979).

> adequate information is obtained as to relative advantages and disadvantages of the various bidding systems, including the front-end bonus bid systems, as applied to different types of tracts.[33]

The lease sales under attack in this case independently and taken together fall well within the percentages required by § 8(a)(5)(B). One-half of the tracts to be leased in Lease Sale 48 were offered on a cash bonus-fixed royalty basis, with the other half solicited on a cash bonus-sliding scale royalty basis. In the public notice announcing Sale 48, the Secretary stated that the bidding plans were designed to facilitate a "valid statistical analysis."[34] Similarly, the announcement for Lease Sale 48, held on July 30, 1979, noted that both systems would again be employed for experimental purposes.[35]

The foregoing makes plain enough Congress's intention that cash bonus-fixed royalty bidding be used widely, and in conjunction with use of other systems. The amendments and legislative reports are replete with other indicia demonstrating that Congress contemplated its continued use as well as delays in the implementation of alternative systems. The statute requires that regulations implementing the new systems be promulgated in advance of their use.

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[33] H.R. Rep. No. 95-1474, 95th Cong., 2nd Sess. 92 (1978). *See also* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 54 (1977); S. Rep. No. 95-284, 95th Cong., 1st Sess. 47 (1977).

[34] 44 Fed. Reg. 30,779 (May 29, 1979).

[35] 44 Fed. Reg. 37,993 (June 30, 1979).

In the first two lease sales of 1979, systems other than cash bonus-fixed royalty bidding were used in 37% of the total acreage offered. J.A. 238.

Toward that end, the Secretary of Energy is required to consult with the Interior Secretary.[36] Just this year the House Committee noted with disapproval that the new regulations could take up to two years to issue.[37] Even the June 1979 GAO report, which appellants use to document their claim of the Energy-Interior jurisdictional battles, reccomends that regulations covering alternative bidding systems be issued "no later than January 1, 1981." [38] We are informed that proposed regulations governing three bidding options—the two systems previously authorized under the original OCS Act and cash bonus-sliding scale royalty bidding which had been employed on an experimental basis —were issued on July 26, 1979.[39] Regulations governing bidding under a profit-sharing system, the option most heavily favored by appellants, must precede notice of a sale by 90 days.[40] Although when pressed at oral argument appellees could not promise a date by which profit-sharing regulations will emerge, they have given repeated assurances that the regulations have been returned to the Department of Energy from Interior and should be out "in the near future."

The legislative scheme also contains an elaborate system of interdepartmental consultation and inter-

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[36] 43 U.S.C.A. § 1337(a) (West Supp. 1979); *see* note 10, *supra*.

[37] *See* H.R. Rep. No. 95-1835, 95th Cong., 2nd Sess. 25 (1979).

[38] J.A. 171 (emphasis added). The Comptroller General went on to note that "once Energy's regulations are finalized on January 1, 1981," the Secretary of the Interior should "issue by March 1, 1981, Interior's own regulations which are consistent with Energy's." J.A. 171-72.

[39] Govt. Br. at 22.

[40] 43 U.S.C.A. § 1337(a)(6) (West Supp. 1979).

governmental coordination for various purposes. For example, the Attorney General, in consultation with the Federal Trade Commission, is accorded a 30-day period in which to review the competitive effects of bids under each lease sale.[41] The section on bidding systems in the annual report on leasing and production is also to be prepared in consultation with the Attorney General.

That Congress was aware of potential delays in implementing the amendments appears from Section 18 of the OCS Act, added in 1978.[42] Section 18 mandates the preparation of a comprehensive oil and gas leasing program in accordance with the policies of the OCS Act. Congress gave the Secretary nine months from the date of enacting the amendments to prepare the plan before submitting it to Congress, the Attorney General, and the governors of states affected by lease sales.[43] In addition, the Secretary must allow 90 days for receiving comments on the plan, and must submit the program and comments to Congress and the President 60 days before approving it.[44] More important, Congress made it clear that leasing was to continue until the comprehensive leasing program became operational. Section 18(d)(3) expressly provides:

> After the leasing program has been approved by the Secretary, or after eighteen months following September 18, 1978, whichever first occurs,

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[41] *Id* at § 1337(c).

[42] *Id.* at § 1344.

[43] *Id.* at § 1344(c)(3). It is our understanding that the Secretary's plan was timely filed in April 1979.

[44] *Id.* at § 1344(d)(1), (2).

> no lease shall be issued unless it is for an area included in the approved leasing program and unless it contains provisions consistent with the approved leasing program, except that *leasing shall be permitted to continue until such program is approved* and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter.[45]

The House report reiterated the clear meaning of that subsection:

> [T]he committee also realized that to prepare a program in conformity with this Act might take up to 18 months, and that leasing should continue during this time. There is intended to be no delay or interruptions in lease sales. During the period of time that the proposed leasing program is being considered and determined, leasing is to continue as heretofore. . . . If the approved leasing program is under judicial challenge, leasing can continue until judicial review is complete.[46]

Thus, Congress did not expect changes to take place overnight. To the contrary, it fully anticipated that an optimal comprehensive leasing plan took time —as much as 18 months or longer—to become opera-

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[45] *Id.* at § 1344(d)(3).

[46] H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 151 (1977). *See also id.* at 48 ("While a new leasing program is being prepared and promulgated, leasing activities are to continue."): S. Rep. No. 95-284, 95th Cong., 1st Sess. 76-77 (1977).

tional. Accordingly, it drafted a detailed schedule for instituting the program, placing outside time limits on the completion of each stage. With these thoughts in mind it is difficult to find a legislative mandate to support appellants' forth-right contention that the continued use of the cash bonus-fixed royalty system and delay in issuing profit-sharing regulations are inconsistent with the 1978 amendments.

Appellants base their case on the "unless clause" of subsection 8(a)(5)(B). That subsection mandates the use of bidding systems other than cash bonus-fixed royalty bidding for 20-60% of all leasing "unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter." [47] Appellants interpret this clause to permit the Secretary to use systems other than cash bonus-fixed royalty bidding, such as profit-sharing, in *all* lease sales. Appellees, on the other hand, maintain that this subsection enables the Secretary to use cash bonus-fixed royalty bidding in all leasing. The legislative reports contain conflicting signals. Both earlier reports supported the government's reading of the clause. The Senate report, for example, saw the clause as an "escape-hatch" to compliance with the mandate to use other systems, in recognition of the fact that "there could be administrative problems involved in implementing new concepts and procedures." [48] Both houses expressed concern that compliance with the percentage limits might unduly retard OCS development.

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[47] 43 U.S.C.A. § 1337(a)(5)(B) (West Supp. 1979).

[48] S. Rep. No. 95-284, 95th Cong., 1st Sess. 73 (1977). *See also* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 139 (1977).

The conference report, however, supports appellants' view. Though it retains a hint that the clause was designed to permit full use of cash bonus-fixed royalty bidding,[49] the report states directly that the percentage limits could be waived in *either* direction:

> The Secretary of the Interior is given the discretion to waive the *minimum or maximum* requirement for the use of bidding systems other than bonus bidding, based on a determination that *either* the minimum or maximum percentage level is not consistent with the purposes and policies of the act.[50]

Assuming, as we do, that subsection 8(a)(5)(B) sets limits which can be waived in either direction in appropriate cases, by the Secretary within his discretion, appellants argue next that this discretion has been abused. It is appellants' position that § 8(a)(5)(B) is qualified—and thus the Secretary's discretion is constrained—by the mandatory requirement of § 18(a)(4) that the leasing program be prepared and maintained in a manner consistent with the principle that:

> Leasing activities shall be conducted to assure receipt of fair market value for the lands leased

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[49] The report discusses a requirement in the statute that the Secretary explain "why the bonus bid system was used or is to be used in *more than* 60 per cent of the areas actually leased," without reference to the situation in which cash bonus bidding would be used in less than 40% of tracts bid. H.R. Rep. No. 95-1474, 95th Cong., 2nd Sess. 93 (1978) (conference report) (emphasis added).

[50] *Id.*

and the rights conveyed by the Federal Government.[51]

As was virtually conceded by appellants at oral argument, the fair market value requirement of § 18(a)(4), appearing in the new section dealing with the comprehensive five-year leasing program, does not come into play until the comprehensive leasing program is ultimately approved.[52] It is our understanding that the Secretary's program applies to lease sales commencing in March 1980 and does not affect those under challenge in the present suit. In the meantime, the appropriate standard appears to be that leases must insure a "fair and equitable return." [53]

We need not explore the difference, if any, between these two standards. Nor need we decide which of the two is currently operative. For we cannot find on the basis of the record before us that the lease sales involved in this case violate either formulation. For this reason, we cannot conclude that the district judge abused his discretion when he determined that appellants "failed to show that utilization of the cash bonus-fixed bidding system with a 16⅔% fixed royalty violates the purposes underlying the Act." [54]

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[51] 43 U.S.C.A. § 1344(a)(4) (West Supp. 1979). Appellants also argued that the Secretary's discretion was checked by provisions concerning the pro-competitive purposes of the amendments, see note 28, *supra*.

[52] Not surprisingly the conference report discusses the fair market value concern only in connection with its analysis of § 18.

[53] 43 U.S.C.A. § 1802(2)(c) (West Supp. 1979).

[54] J.A. 294.

The trial judge relied on evidence offered by the government which sought to prove that the contested lease sales complied with the OCS Act. Although contrary evidence was introduced by appellants, there was a basis for believing that a 16⅔% royalty was warranted on these particular leases of "frontier" OCS lands.[55] The risk and uncertainties inherent in leasing these remote, unproven properties all but nullifies the impact of appellants' comparisons of these sales to those held by California or foreign governments. We recognize further that it is for the agency to weigh the evidence initially and we must restrain from interfering with a rational agency determination which is supported by substantial evidence.[56]

The district court ruling is fortified by additional factors. As the trial court noted, the public interest is protected by various Congressional oversight mechanisms incorporated into the OCS Act. Yet rather than express displeasure with the post-amendments administration of the leasing program, Congress recently merely took note of the schedule for implementing leasing regulations in the years ahead.[57] This observation reinforces our conclusion expressed earlier that Congress plainly intended leasing to continue in the interim. Significantly, although several major developments coalesced to warrant the massive overhaul of the OCS Act in 1978, conditions

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[55] *See* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 94 (1977).

[56] *See* County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1383 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[57] H.R. Rep. No. 95-1835, 95th Cong., 2nd Sess. 25 (1979).

have changed relatively little since passage of the amendments. We see no occasion yet to say that the Secretary was under a duty to use the "escape hatch" in order to deviate from the basic plan laid out in the amended Act.

We also cannot be oblivious to the many often conflicting policies and purposes underlying the OCS Act amendments. Though the attainment of competition and fair market value were of undoubted concern to the legislators, their primary interests lay in insuring expeditious oil and gas development in a manner consistent with environmental protection.[58] It should come as no surprise that a scheme which mandates experimentation among alternative systems should on occasion fall short of perfection in achieving some legislative goals.[59]

Thus far, the district court has only denied a preliminary injunction. At a trial on the merits, the district court is free to consider the case in the light of intervening developments. It can reconsider all matters raised in the motion for preliminary injunctive relief. It may also explore several matters not previously before it. For example, it could examine

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[58] *See* H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 53 (1977) ("The basic purpose of [the OCS Act amendments] is to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."); S. Rep. No. 95-284, 95th Cong., 1st Sess. 42-43 (1977).

[59] In discussing the procedures for utilizing the various bidding systems, the Senate report conceded:

> These alternatives may not be the "perfect solution." However, they . . . are certainly worth trying on an experimental basis.

S. Rep. No. 95-284, 95th Cong., 1st Sess. 47 (1977).

the Secretary's reasons for using cash bonus-fixed royalty bidding on as much as 50% of the tracts bid, rather than on some lesser basis still falling within the statutory guidelines. Or it might consider more directly than it had occasion to previously whether the 16⅔% royalty fixed by the Secretary for cash bonus bidding is unduly low. Lastly, at some point in time the Secretary's delay in issuing profit-sharing regulations and in failing to experiment among alternative bidding systems more widely may constitute a violation of the OCS Act amendments. We can not say on this record that the government's actions to date have run afoul of the legislative scheme.

In view of the Secretary's endeavor, and the national interest, to expedite exploration under leases, we think it appropriate to observe that although technically the district court has latitude to retroactively remedy those sales already concluded (should it reverse its earlier inclination), on the facts before us it is unlikely that such a course would constitute a sound exercise of judicial discretion. The district court would be required to balance the harm to appellants against that suffered by the government and the successful bidders in the completed lease sales. If the Secretary is forced to reschedule completed sales the attendant disruption of OCS development would surely disserve priorities set by Congress. All previously successful bidders would find wasted the enormous outlays of capital they invested in prior bidding, and all would be disadvantaged by the public disclosure of their original bids. Furthermore, the government, and derivatively the public, would be injured by this prior disclosure, thereby destroying the essence of secret bidding procedures.

Affirmed.

WALD, *Circuit Judge, concurring*: I concur in Judge Leventhal's opinion but write separately to underscore a few points of extreme importance in this case, which may be considered in the course of any trial on the merits.

The 1978 amendments to the Outer Continental Shelf Lands Act aimed at comprehensive reform of traditional oil leasing practices of the United States. The legislators were motivated to act by their concern that the nearly exclusive use of the traditional cash bonus-fixed royalty bidding system was not operating in the best interest of the public. They fixed three goals in the new Act relevant here, goals which in practice might conflict but which they expected to be accommodated by the Secretary of Interior's discretion; a system of leasing which would provide fast, efficient exploitation of our energy resources, a fair market value return for the people of the United States, and improved competition among the lessees. The Act clearly envisioned *prompt* experimentation with a variety of methods of leasing to see which would best operate in practice to meet all three goals. 43 U.S.C. § 1337(a)(1). A few of these methods had been tried sporadically under the old Act. Others, primarily the profit sharing option, showed promise but had never been tried by the United States. The statute specifically required the Secretary of the Interior to develop and submit to Congress a comprehensive 5-year leasing program within nine months after the Act became effective, 43 U.S.C. § 1344(c)(3), and it is a fair inference that Congress intended he should be able to pick and choose between the various leasing methods authorized in the new Act as soon as possible after the plan was approved in order to "assure receipt of fair

market value for the lands leased." § 1344(a)(4). In the course of this experimentation, considerable discretion would be necessarily vested in the Secretary to balance a variety of goals and policies. But by the very terms of the Act no meaningful experimentation can begin until the regulations under which the new leasing methods will operate have been promulgated. Defendants' immediate responsibility is to promulgate the necessary regulations as rapidly as possible in order to implement Congress' reform goals.*

An important trust has been given to the defendants here, since through inordinate delay the entire purpose of the Act could be frustrated and in the meantime, according to disturbing estimates submitted by the plaintiffs, the government and ultimately the taxpayers may be losing hundreds of millions of dollars in future revenues with each sale. There are also troublesome indications in this record that the delay which has already occurred is due not only to the complexity of the defendants' task in promulgating new regulations, but to a jurisdictional squabble between agencies over control of the process of leasing our offshore oil and gas fields.

The majority opinion, in which I concur, concludes that at this time and in this posture of the case, the Secretary of Interior has not contravened "the letter of the law." Nevertheless, the time may be approaching when the Secretary, by continuing to grant leases without utilization of the panoply of experimental

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* On December 6, 1979, just prior to issuance of this opinion, a notice of proposed rulemaking was published, inviting comment and announcing hearings on regulations to cover one new bidding method: cash bonus bidding—fixed net profit sharing. 44 Fed. Reg. 70,390 (1979).

bidding systems authorized by the Act, is frustrating the essential experimental purpose of the Act and thus abusing the discretion which has been granted him. At this point, on this record, the delay is not clearly unreasonable, but the more sales of leases which are held without promulgation of the new regulations which are necessary before the congressionally-mandated program of reform can get underway, the more unreasonable the delay appears. As the Court's opinion points out in its concluding paragraph, leases once submitted for bids, much less granted, are virtually impossible to withdraw, no matter how detrimental to the public interest they turn out to be. Certainly these new bidding procedures are complicated, but our energy program is a matter of the highest priority, and the new Act was passed well over a year ago.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. (Supp. II) 7152(b) provides in relevant part:

> (b) There are transferred to, and vested in, the Secretary [of Energy] the functions of the Secretary of the Interior to promulgate regulations under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.], the Mineral Lands Leasing Act [30 U.S.C. 181 et seq.], the Mineral Leasing Act for Acquired Lands [30 U.S.C. 351 et seq.], the Geothermal Steam Act of 1970 [30 U.S.C. 1001 et seq.], and the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.], which relate to the—
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> > (1) fostering of competition for Federal leases (including, but not limited to, prohibition on bidding for development rights by certain types of joint ventures);
> >
> > (2) implementation of alternative bidding systems authorized for the award of Federal leases;
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> * * * * *

2. 43 U.S.C. (Supp. II) 1337 provides in relevant part:

> (a)(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease or submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section

1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—

(A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;

(B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold; or

(H) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

* * * * *

(4)(A) The Secretary of Energy shall submit any bidding system authorized in subparagraph (H) of paragraph (1) to the Senate and House of Representatives. The Secretary may institute such bidding system unless either the Senate or the House of Representatives passes a resolution of disapproval within thirty days after receipt of the bidding system.

* * * * *

(5)(B) The bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter.

* * * * *

(9) Within six months after the end of each fiscal year, the Secretary of Energy, in consultation with the Secretary of the Interior, shall report to the Congress with respect to the use of various bidding options provided for in this subsection. Such report shall include—

* * * * *

(D) if applicable, the reason why a particular bidding system has not been or will not be utilized; and

(E) if applicable, the reason why more than 60 per centum or less than 20 per centum of the area leased in the past year, or to be offered for lease in the upcoming year, was or is to be leased under the bidding system authorized by subparagraph (A) of paragraph (1) of this subsection.

(b) An oil and gas lease issued pursuant to this section shall—

(1) be for a tract consisting of a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary

may determine, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit;

(2) be for an initial period of—

(A) five years; or

(B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions,

and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon;

(3) require the payment of amount or value as determined by one of the bidding systems set forth in subsection (a) of this section;

* * * * *

3. 43 U.S.C. (Supp. II) 1343 provides in relevant part:

Within six months after the end of each fiscal year, the Secretary shall submit to the President of the Senate and the Speaker of the House of Representatives the following reports:

* * * * *

(2) A report prepared after consultation with the Attorney General, with recommendations for promoting competition in the leasing of outer Continental Shelf lands, which shall include any recommendations or findings by the Attorney General and any

plans for implementing recommended administrative changes and drafts of any proposed legislation, and which shall contain—

(A) an evaluation of the competitive bidding systems permitted under the provisions of section 1337 of this title, and, if applicable, the reasons why a particular bidding system has not been utilized;

(B) an evaluation of alternative bidding systems not permitted under section 1337 of this title, and why such system or systems should or should not be utilized;

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